Supreme Court, U. S.
FILED
AUG 6 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA

AND

LAWRENCE W. I'ANSON,

IN HIS PERSONAL AND OFFICIAL CAPACITY

AS CHIEF JUSTICE OF THE SUPREME COURT OF VIRGINIA,

Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION OF THE COURT BELOW

The Opinion of the District Court appears as an untitled attachment to the Order of the three-judge District Court declaring unconstitutional certain rules of the Supreme Court of Virginia prohibiting advertising by attorneys and enjoining application of the rule to the appellees. The Order and the Opinion are not reported. The Order is attached

hereto as Appendix 1, the Opinion as Appendix 2. An earlier opinion in the same case is reported *sub. nom. Consumers Union* v. *American Bar Association,* 427 F.Supp. 506 (E.D. Va. 1976), *vacated and remanded* 433 U.S. 917 (1977).

PRELIMINARY STATEMENT

The Supreme Court of Virginia and Lawrence W. I'Anson, Chief Justice of the Supreme Court of Virginia (hereinafter the Virginia Court), appeal from the order and memorandum opinion of the three-judge District Court for the Eastern District of Virginia, entered on May 8, 1979, awarding declaratory and injunctive relief and attorneys' fees against the Supreme Court of Virginia and its Chief Justice, in a proceeding involving a challenge to the court's rule regulating attorney advertising. This Court has jurisdiction over this appeal, and the questions presented are substantial.

SUMMARY OF ARGUMENT

The award of declaratory and injunctive relief in this case was prohibited by the doctrine of absolute judicial immunity. Accordingly, the award of attorneys' fees was improper. Where the basis for jurisdiction is a challenge to a judicial act, the immunity is grounded in the separation of powers and is absolute. This immunity is of a higher order than some immunities which originate in doctrines of comity or federalism or are conditioned upon "good faith."

Even if it is assumed that judicial immunity is only a creature of the common law which may be repealed by Congress, there is nothing in the language or legislative history of the Civil Rights Attorney's Fees Award Act of 1976 which repeals this immunity.

Alternatively, the three-judge court abused its discretion

in awarding attorneys' fees for post-trial lawful acts of a party. It erroneously assumed that the challenged rule governing the professional responsibility of attorneys was invalid on its face (rather than as applied), and that a facially valid rule had to be adopted. The three-judge court had no facts before it from which it could have inferred an improper motive from the failure to correct the challenged act.

The judgment and the award of fees against the Virginia Court should be reversed. The attorney-advertising rule should not be declared unconstitutional on its face, but only insofar as it may be in conflict with the constitutional rights of attorneys to advertise. In the alternative, the case should be remanded to the three-judge court with instructions to take evidence whether there is a proper factual basis for awarding fees against the Virginia Court.[1]

JURISDICTION

This suit was brought by the appellees before a three-judge District Court pursuant to 28 U.S.C. § 2281 seeking an order declaring unconstitutional Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility, a regulation of statewide application. The order of the District Court granting the relief requested by the appellees was entered on May 8, 1979. Notice of appeal was filed by the Virginia

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[1] An argument properly may be made that in adopting the attorney-advertising rule the Supreme Court of Virginia acted in a legislative capacity. The original decision of the District Court so found. 427 F.Supp. at 515. On remand, the dissent (App. 2 at 15) argued absolute legislative immunity prevailed. Appellants prefer to frame the argument that for an act in a judicial capacity, they are entitled to an immunity coextensive with legislative immunity. If it be determined that legislative immunity is the applicable doctrine, Judge Warriner's dissent argues the point effectively, and appellants can add nothing to it.

Court on June 7, 1979. The jurisdiction of this Court to review this decision by appeal is conferred by 28 U.S.C. § 1253. Jurisdiction lies under 28 U.S.C. § 1253 because the action was filed prior to the repeal of 28 U.S.C. § 2281 on August 12, 1976 by Section 7 of P.L. 94-381. P.L. 94-381 now appears as a footnote to 28 U.S.C. § 2284 and provides that the repeal does not apply to actions filed prior to the effective date of the Act.

THE RULE INVOLVED

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in a dignified form:

* * *

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular

field of law or law practice but only if authorized under DR 2-105(A)(4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.

QUESTIONS PRESENTED

1. Is the Supreme Court of Virginia immune from judgment under the doctrine of judicial immunity?
2. May the Civil Rights Attorney's Fees Awards Act of 1976 be construed to permit an award of attorneys' fees against the Supreme Court of Virginia for its judicial acts?
3. Does the doctrine of judicial immunity preclude the award of attorneys' fees for failure to correct a challenged judicial act which is the subject of litigation?
4. On the facts before it, did the District Court abuse its discretion in awarding fees against the Virginia Court?

STATEMENT OF THE CASE

On February 27, 1975, the appellees filed a complaint pursuant to 28 USC § 1343(3) and 42 USC § 1983 requestting the convening of a three-judge court to declare unconstitutional DR-2 102(A)(6) of the Virginia Code of Professional Responsibility and to enjoin the Virginia State

Bar, the American Bar Association, the Supreme Court of Virginia, and others, from prohibiting the publication of an advertising directory. The case was tried on May 17, 1976, prior to passage of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The District Court entered an order on December 17, 1976, granting partial relief in three separate opinions. Both parties appealed and this Court vacated and remanded for further consideration in light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). *Consumers Union* v. *American Bar Association,* 433 U.S. 917 (1977).

Upon remand, defendants stipulated that they had no objection to publication of the advertising directory. (Response to Motion for Judgment on the Merits, June 12, 1978.) In July of 1978, the District Court heard oral argument on the issue of attorneys' fees. On May 8, 1979, the District Court entered its Order treating the case for purposes of awarding fees as one brought under 42 U.S.C. § 1983 and awarding declaratory and injunctive relief and attorneys' fees against the Virginia Court. The District Court found jurisdiction under 28 U.S.C. § 1343(3) (App. 2 at 3).

The District Court apparently based its award of attorneys' fees solely on the fact that in 1976, before this Court's decision in *Bates,* the Supreme Court of Virginia had rejected a proposed revision of the rule in question and upon the conclusion, unsupported by any evidence, that the Court had been derelict in not, then or thereafter while the case was pending, amending the rule. In its opinion, the District Court formally announced for the first time that "in the interest of comity," it had "delayed" its decision in order to afford the Supreme Court of Virginia an opportunity to amend its rule. Later, the District Court summarily rejected the Virginia Court's petition for leave to present evidence concerning the ongoing efforts of the Virginia State Bar and the Supreme Court of Virginia to formulate a constitutional rule.

THE QUESTIONS ARE SUBSTANTIAL

I.

The Supreme Court Of Virginia Is Immune From Judgment Under The Doctrine Of Judicial Immunity

The Virginia Court was immune from suit for declaratory or injunctive relief. Accordingly, it was inappropriate to award attorneys' fees as part of the costs.

This immunity is of a high order. It is a common law rule carried forward in the principles of separation of powers embodied in the "guarantee clause" of Art. IV § 4 of the Constitution and the Tenth Amendment. Its function is not merely protection from damages in an individual capacity, but is to guard governmental processes from intrusion by other governmental entities. At issue is the liability of a court for a judicial act. The only basis for jurisdiction over the Supreme Court of Virginia was that it adopted a rule later determined to be unconstitutional in part. This is no different from the situation of a legislature which enacts legislation later determined to be invalid. Immunity from liability in both cases is absolute.[2]

The framers believed in an independent judiciary as an indispensable element of a republican form of government. *The Federalist,* No. 48 (J. Madison) 146; No. 51 (J. Madison) 159, 161; No. 78 (A. Hamilton) 227; No. 39 (J. Madison) 114-17 (2d ed., R. Fairfield, 1966)., pp. 236, 303-05, 488 *et seq.,* 494 *et seq.* Abrogation of this immunity would

[2] The instant facts are materially different from the situation in *Hutto* v. *Finney,* 437 U.S. 678 (1978), wherein this Court held that an award of attorneys' fees could be made against a state agency when the agency was not a party. In *Hutto,* individual state employees were parties, and the fee award was made against the agency by which they were employed. In the present case the District Court found that on the facts before it plaintiffs were not entitled to recover fees of the other defendants or the agency by whom they were employed. (App. 2 at 12.)

be in derogation of an essential component of a republican form of government. To override an essential state function, Congress must have express authority. *National League of Cities* v. *Usery,* 436 U.S. 833 (1976).

Absolute immunity is thus significantly different from the various abstention and sovereign immunity doctrines set forth in such decisions as *Younger* v. *Harris,* 401 U.S. 37 (1971), and *Edelman* v. *Jordan,* 415 U.S. 651 (1974). Those principles are founded upon considerations of "equity, comity, and federalism which do not have constitutional origin." Those decisions do not prohibit attacks on the facial constitutionality of state policy.[3] Similarly, absolute immunity is different from that involved in coercive civil process in aid of a court's jurisdiction, *e.g.,* writs of mandamus and similar writs. *See Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821); *Ex parte Bradley,* 74 U.S. (7 Wall.) 364 (1868). None of the foregoing constitute a fundamental state function, such as the exercise of judicial authority, which is constitutionally protected from encroachment by other branches of government.

If Congress can require a court to defend its judicial acts against a potential award of attorneys' fees for punitive purposes, it can require any court to defend itself against an award of damages or imposition of criminal sanction for the same acts. This would do unconscionable violence to our framework of government.

As early as the reign of Richard III, the English common law accorded absolute immunity to judges for acts committed within their judicial capacity. 6 W. Holdsworth, *A Heritage of English Law* 235 (1927). *Floyd* v. *Barker,* 12 Coke Rep. 23, 77 Eng. Rep. 1305 (1607). This immunity was adopted in this country in *Bradley* v. *Fisher,* 80 U.S. (13

[3] *Steffel* v. *Thompson,* 415 U.S. 452 (1974); *Theard* v. *United States,* 354 U.S. 278 (1957); *Fairmont Creamery* v. *Minnesota,* 275 U.S. 70 (1927).

Wall.) 335 (1871),[4] wherein the defendant had stricken from the rolls of the court the name of an attorney for defending one of the conspirators in the Lincoln assassination.

In deciding *Tenny* v. *Brandhove,* 341 U.S. 367 (1951), the Court was willing to make an assumption that Congress could repeal legislative immunity in order to reach the statutory question upon which the case was decided. The Court then concluded that Congress had not intended to repeal this immunity and that the immunity extended to legislators as well as to congressmen.

Legislative immunity under the "Speech or Debate Clause" of Article I § 6, cl. 1 of the Constitution provides members of Congress absolute immunity "not only from the consequences of litigation's results, but also from the burden of defending themselves." *Davis* v. *Passman,* 99 S.Ct. 2264, 2271 (1979); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967). Immunity under the "Speech or Debate Clause" was extended to state legislators, who are immune from all civil process for their legislative acts by *Tenny* v. *Brandhove, supra. See Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973). Similarly, judicial immunity is "equally established" as a defense to an action under 42 U.S.C. § 1983. *Pierson* v. *Ray,* 386 U.S. 547, 554-55, n. 9 (1967), citing *Bauers* v. *Heisel,* 361 F.2d 581 (3d Cir. 1966). *Bauers* recognized that Congressional abrogation of judicial immunity would constitute a legislative invasion of the judicial domain, in violation of the constitutional guarantee of a republican form of government. *Stump* v. *Sparkman,* 435 U.S. 349, 355 (1978), describes the immunity as extending to all acts performed in a judicial capacity.

Although *Bradley, Pierson,* and *Stump* specifically involved only suits for damages, none of the decisions limited

[4] The rationale of *Bradley* was adopted in Virginia in *Johnston* v. *Moorman,* 80 Va. (5 Hans.) 131, 139-140 (1885), which noted that the immunity exists to assure the public that "the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* at 140, quoting *Scott* v. *Stansfield,* 3 Law Rep. Exchequer, 220 (1868).

the immunity to damage awards. In *Pierson,* judicial immunity was interpreted to protect against liability in all civil actions which, under 42 U.S.C. § 1983, includes "an action at law, suit in equity, or other proper proceedings for redress." 386 U.S. at 554.[5]

In fact, the rationale for immunity from money damages is equally applicable to actions for declaratory and injunctive relief. Judicial immunity exists because of the special nature of the responsibilities of judges; absolute immunity is necessary to assure that judges can perform their respective functions without harassment. *Butz* v. *Economou,* 438 U.S. 478 (1978).

The need for this immunity is seen in the instant case: The Supreme Court of Virginia in 1970 adopted a disciplinary rule barring advertising by attorneys. The rule had been adopted by the American Bar Association in 1969. Approval of similar rules applicable to other professions by this Court made the law seem settled.[6] By 1975, when this

[5] This issue has not been decided by this Court. *Falkner* v. *Blanton,* 488 F.2d 551 (5th Cir. 1974), *cert. denied,* 419 U.S. 1080, *rehearing denied,* 419 U.S. 977 (Douglas, J., dissenting). The scope of the immunity was presented to the Court in *Littleton* v. *Berbling,* 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub. nom. O'Shea* v. *Littleton,* 414 U.S. 488 (1974).

Most authorities considering the point have concluded that judicial immunity extends to all actions, not just damage claims. *Mirvin* v. *Justices of the Supreme Court of Nevada,* 415 F.Supp. 1178, 1192 (D. Nev. 1976); *Mackay* v. *Nesbett,* 285 F.Supp. 498, *aff'd,* 412 F.2d 846 (9th Cir. 1969), *cert. denied,* 396 U.S. 960, 397 U.S. 1004; *Gay* v. *Heller,* 252 F.2d 313 (5th Cir. 1958); *Peckham* v. *Scanlon,* 241 F.2d 761 (7th Cir. 1957); *Tate* v. *Arnold,* 223 F.2d 782 (8th Cir. 1955); *Adkins* v. *Underwood,* 370 F.Supp. 510, *aff'd,* 520 F.2d 890, *cert. denied,* 423 U.S. 1017; *Brown* v. *Dunne,* 409 F.2d 341 (7th Cir. 1969); *Cheramie* v. *Tucker,* 493 F.2d 586 (5th Cir. 1974).

But see White v. *Crowell,* 434 F.Supp. 1119 (W.D. Tenn. 1977) *(per curiam); United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *Erdmann* v. *Stevens,* 458 F.2d 1205 (2d Cir. 1972).

[6] *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 611-13 (1935); *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963); *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955).

suit was filed seeking to declare *all* regulation of advertising unconstitutional, the Virginia State Bar was required to defend the rule or abandon it. The 5-4 decision of this Court in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), rendered the rule unenforceable on the facts of the case. *Bates* upheld regulation of attorney advertising, at least as to matters which were false, misleading or deceptive and left the door open to barring advertisement of undefined services not of a routine nature. Under the *Bates* decision, these plaintiffs have prevailed in part and have requested a sum in excess of $121,000 in attorneys' fees.

The effect of *Bates* was to hold rules similar to Virginia's invalid only insofar as they conflicted with *Bates.* 433 U.S. at 383-84. The District Court seems to have applied the wrong rule, concluding that *Bates* voided the Virginia rule entirely.

To expose the considered judgments of a court to liability for monetary awards even in the guise of attorneys' fees and to subject the members of the tribunal to the jurisdiction of another court can have no effect but to compel decisions on the basis of expediency. Introducing considerations extraneous to the law will be detrimental to the judicial process. Such a situation is precisely the reason for judicial immunity from judgment of any kind.

Alexander Hamilton wrote that, "there is no liberty if the power of judging be not separated from the legislative and executive powers. Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments. . . . The complete independence of the courts of justice is peculiarly essential in a limited constitution." The Federalist, *supra,* No. 78 at 227-28.

II.

42 U.S.C. § 1988 Should Not Be Construed To Permit An Award Of Attorneys' Fees Against The Supreme Court of Virginia For Its Judicial Acts

Proper construction of the Civil Rights Attorneys' Fees Awards Act shows that the District Court erred in construing the act to abrogate judicial immunity from the award of fees. *Hutto* v. *Finney, supra,* 437 U.S. at 700 (Brennan, J. concurring) found a congressional intent to award fees against States. The District Court, however, interpreted a footnote in a House Report as rendering *Pierson* v. *Ray* immunity inapplicable to bar attorneys' fees awards and therefore extended the holding in *Hutto* to abrogate judicial immunity.[7]

Appellants do not question that a judge who acted under color of law but outside his jurisdiction would be subject to judgment under 42 U.S.C. § 1983 and hence subject to the fee awards in spite of his good faith immunity. However, where the court has acted only within its jurisdiction, it is absolutely immune. There is nothing in the wording of the statute or the legislative history to imply a congressional intent to abrogate the immunity from fee awards. Just as *Pierson* v. *Ray, supra,* concluded that enactment of 42 U.S.C. § 1983 did not abrogate judicial immunity, so is there likewise no reason to imply that 42 U.S.C. § 1988 abrogated the immunity from the award of attorneys' fees.

As Justice Powell noted in his dissent in *Hutto*:

> "But in this sensitive area of conflicting interests of constitutional dimension, we should not permit items of

[7] (*App.* 2 at 8.) The footnote merely included *Pierson* v. *Ray, supra,* among a listing of cases discussing various immunities. There is no reason for this Court to construe that footnote as doing anything more than allowing fees for those acts answerable to suit under so-called "good faith immunity."

> legislative history to substitute for explicit statutory language. *SEC* v. *Sloan,* 436 U.S. 103, 121 (1978). The court should be hesitant to presume general congressional awareness of Eleventh Amendment consequences of a statute that does not make express provision for monetary recovery against the States. *Id.* at 706.

Because of the potential impact of attorneys' fees awards on the judiciary, this Court should adopt Justice Powell's logic, and decline to infer a legislative intent from an ambiguous footnote in a legislative report. Where, as here, the only basis for jurisdiction is a judicial act, then a clear expression of legislative intent is required. Congress enacted 42 U.S.C. § 1988 with the knowledge that *Pierson* v. *Ray, supra,* and *Tenny* v. *Brandhove, supra,* required an express repeal of judicial and legislative immunity. Thus, Congress could not have intended to impose liability for fees in situations where absolute immunity prevails.

The District Court erred in assuming that, because judicial immunity is a creature of common law, such immunity can be repealed by implication by Congress. That argument was rejected by this Court in *Tenny* v. *Brandhove, supra,* wherein the issue was framed as:

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Government here? 341 U.S. at 376."

After making the concededly "big assumption" that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere, the Court answered its prophetic question:

> "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a

tradition so well grounded in history and reason by covert inclusion in the general language before us."

* * * *

"[H]ere the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and *** the statute of 1871 does not create civil liability for such conduct." *Id.* at 379.

Similar logic applies to judicial immunity.

III.

The Doctrine Of Judicial Immunity Precludes An Award Of Attorneys' Fees As A Penal Measure

The circumstances in which the award of attorneys' fees was made against the Virginia Court show that the purpose was not so much to award costs to the prevailing party as to punish the Virginia Court for lawful post-*Bates* conduct with which the District Court merely disagreed. To protect the judiciary from this sort of intrusion is precisely the reason for immunity from damages.

The injury to the independence of the State judiciary by the decision of the District Court is underscored by the fact that the award of fees was based on a conclusion unsupported by evidence and without any prior order directing amendment of the rule.[8] In its Opinion the District Court

[8] The Virginia Court's petition for rehearing to put on evidence on the matters of concern to the three-judge court was denied without an opinion. (Order May 30, 1979.) The District Court Opinion avoids determination of the serious immunity issues by invoking the sentiment expressed in *Hutto* v. *Finney, supra,* 437 U.S. at 691, that an award of fees against a defendant acting in bad faith was tantamount to a fine for contempt and "vindicated the District Court's authority over a recalcitrant litigant." This simply overlooks the fact that *Hutto* involved the refusal to comply with a judgment and that bad faith was found as a fact after a hearing.

formally announced for the first time that it had delayed its decision to afford the Supreme Court of Virginia an opportunity to amend its rule. (App. 2 at 13.)

If the policy of protecting the independence of the judiciary means anything, it must afford protection from the abuses inherent in allowing one tribunal to award a potentially punitive sum against another. The award was made for punitive reasons and therefore is not different from an award of damages or a contempt citation against the Virginia Court. That such an award may be based upon facts not in evidence and without affording an opportunity to show the real facts is even more illustrative of the threat to the independence of the judiciary.

IV.

Even Assuming That Fees May Be Awarded Against A Court For A Judicial Act, The District Court Abused Its Discretion In Awarding Fees

The District Court's opinion did not assign as a basis for awarding fees against the Virginia Court the fact that the Court had adopted in 1970 the ABA Rule prohibiting advertising by attorneys. In view of the immunity of the Supreme Court and its Chief Justice, it would certainly have been error to do so. The District Court did not find that any law or lawful process of that Court imposed an obligation to amend the rule. The District Court simply assumed without any basis in fact that the Virginia Court was in some way being obstructive. The District Court refused the Virginia Court's petition to be allowed to present evidence on the extensive ongoing State activity to revamp advertising and solicitation rules. The result of denying the petition for rehearing was to force the Virginia Court into an appeal without the opportunity to show its unquestioned good faith.

a.

THERE WAS NO OBLIGATION UPON THE SUPREME COURT OF VIRGINIA TO CORRECT A PRIOR JUDICIAL ACT WHICH WAS STILL IN LITIGATION

The District Court's concern arose from the fact that in holding the Virginia rule unconstitutional on its face it erroneously believed the rule to be wholly void for overbreadth, thus requiring amendment of the rule. The original decision of the District Court had been based on an application of the overbreadth doctrine. 427 F.Supp. at 519. The fact is that under *Bates,* the rule is enforceable as long as it is applied in a manner consistent with *Bates.* 433 U.S. at 383-84. As the petition for rehearing alleged and as the Virginia Court was prepared to show, after *Bates,* the Virginia Court was following its established procedure of not amending a disciplinary rule of court without receiving recommendations on the subject from the state administrative agency, the Virginia State Bar, through which the court regulates the practice of law in Virginia. The Virginia State Bar was acting to draft such amendments (see "Petition for Rehearing," May 22, 1979). In the meantime, by not acting *sua sponte* to amend the rule, Virginia was lawfully applying the old rule only to the extent allowed by *Bates,* thus violating no principle of law or any formal directive of the District Court.

b.

THE DISTRICT COURT HAD NO FACTS BEFORE IT TO SUGGEST THAT THE RULE SHOULD BE CHANGED

The District Court failed to consider that the Attorney General of Virginia had ruled, in an opinion disseminated by the Virginia State Bar to its members, that the Virginia rule would not be enforced except to the extent that enforcement was allowed under *Bates.*[9] Similarly, the District Court must have been unaware that a proposed rule rejected by the Supreme Court of Virginia in 1976 would not have passed muster under *Bates,* although patterned after a rule proposed by the American Bar Association. In addition, the District Court apparently overlooked that Consumers Union had advised that it would press this litigation even if the 1976 rule had been adopted. And the District Court had given every indication that it would not hold the case moot even if the rule was amended. Furthermore, the District Court was unaware, because of its post-decision refusal to hear evidence on the issue, that the delay in adopting a new rule was the result of extensive activities by the Bar to recommend new advertising *and* solicitation rules which exceeded minimal constitutional requirements. The District Court failed to recognize that *Bates* left a number of serious questions unresolved.

There was no legal or factual basis for criticizing the conduct of the Virginia Supreme Court, which had no knowledge that the District Court was awaiting amendment of the rule. Accordingly, to award fees for post-*Bates* lawful acts of a party is the most extreme abuse of discretion. Further, by denying the Virginia Court's petition for rehearing, the abuse of discretion was only compounded.

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[9] A copy of the Attorney General's Opinion had been attached as part of Defendants' "Response to Plaintiff's Motion for Expedited Consideration," December 28, 1978, in which it was argued that none of the defendants had taken any action to enforce the Virginia rule in a manner contrary to *Bates.* In that pleading it was noted that the Attorney General had taken the extraordinary step of intervening on the side of the defense in a criminal prosecution brought under the Virginia *statute* prohibiting advertising by attorneys. The Attorney General argued that the indictment was for acts allowable under *Bates.* The indictment was dismissed.

CONCLUSION

The judgment of the District Court should be reversed insofar as it applies to the Supreme Court of Virginia and the Chief Justice. The award of attorneys' fees against the Virginia Court should be reversed. The judgment of the District Court should be modified to declare the rule unconstitutional only insofar as it is applied in a manner contrary to *Bates*. In the alternative, the case should at least be remanded with instructions to the District Court to take evidence on the question whether there were facts to justify an award of fees against the Virginia Court.

Respectfully submitted,

THE SUPREME COURT OF VIRGINIA
and
THE HONORABLE LAWRENCE W. I'ANSON,
Appellants.

By: s/MARSHALL COLEMAN
Attorney General of Virginia

MARSHALL COLEMAN
Attorney General

WALTER H. RYLAND
Chief Deputy Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
(804) 786-2071

CERTIFICATE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, and counsel for the Supreme Court of Virginia and the Chief Justice, hereby certify that three copies of this Jurisdictional Statement have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 6th day of August, 1979, as follows:

Mark Silbergeld
Ellen Broadman
Consumers Union
1714 Massachusetts Avenue
Washington, D. C. 20036

James W. Benton, Jr.
Hill, Tucker & Marsh
214 East Clay Street
P. O. Box 27363
Richmond, Virginia 23261

All parties required to be served have been served.

s/MARSHALL COLEMAN
Attorney General of Virginia

APPENDIX

APPENDIX 1

* * *

ORDER

For the reasons stated in the memorandum of the Court this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

1. The publication described in plaintiffs' complaint, as amended, is declared valid and constitutionally protected;

2. The Virginia Code of Professional Responsibility Disciplinary Rule 2-102(A)(6) is declared unconstitutional on its face;

3. The defendants, their successors in office, their agents and attorneys and all acting in concert therewith are permanently enjoined from enforcement of Virginia Code of Professional Responsibility Disciplinary Rule 2-102(A)(6);

4. The Supreme Court of Virginia in its official capacity, and the Honorable Lawrence W. I'Anson, in his official capacity as Chief Justice thereof, are ordered to pay to plaintiffs their costs and reasonable attorneys fees which plaintiffs incurred during the pendency of this action, from the filing by plaintiffs of their complaint to the entry of this order;

5. Counsel for the respective parties are directed to meet and confer in an effort to reach an amicable agreement on the issue of the amount of attorneys fees to be paid. In the event the parties are unsuccessful in resolving this issue, counsel for plaintiffs are directed to file with this court within thirty (30) days of this date a motion for an award of a specified amount for costs and attorneys fees in this case, accompanied by supporting data in support thereof. Defendants may within twenty (20) days thereafter respond to such a motion, after which plaintiffs shall have ten (10) days to reply.

Let the Clerk send a copy of this order and the Court's memorandum to all counsel of record.

* * *

Date: 8 May 1979

APPENDIX 2

* * *

MERHIGE, J.

This matter comes before this 28 U.S.C. § 2281 three judge district court on remand from the United States Supreme Court for "further consideration in light of *Bates* v. *State Bar of Arizona.*" *Consumers Union of the United States, Inc.* v. *Virginia State Bar,* 433 U.S. 917 (1977). In its order, the Supreme Court vacated this court's prior judgment, reported at 427 F. Supp. 506 (E.D. Va. 1976).

The facts of the instant case were stated at length in *Consumers Union of United States, Inc.* v. *American Bar Association,* 427 F. Supp. 506, 508-512 (E.D. Va. 1976), and shall, therefore, be recounted now only briefly. Plaintiffs, Consumers Union of United States, Inc. (hereinafter "Consumers Union") and Virginia Citizens Consumer Council (hereinafter "Consumers Council"), are non-profit consumer organizations which have brought this 42 U.S.C. § 1983 action seeking declaratory and injunctive relief, and reimbursement from defendants for their costs and attorney fees incurred in prosecuting this action.

Defendants, Virginia State Bar (hereinafter "State Bar"), the Supreme Court of Virginia, Howard W. Dobbins, Rothwell J. Lillard and the Honorable Lawrence W. I'Anson, were all responsible, in varying degrees, for the adoption, interpretation, and/or enforcement of the Code of Professional Responsibility of the Virginia State Bar.[1]

In 1974, plaintiff Consumers Union, in questionnaires, sought to elicit certain information from all Arlington County, Virginia attorneys who were licensed to practice law in Virginia; Consumers Union planned to use the information it received in publication of a directory that was intended to help consumers select and evaluate Arlington

County attorneys. Much of the information which Consumers Union solicited and planned to publish in the directory, however, was data which, if disseminated to the public, would violate certain Virginia Code of Professional Responsibility (hereinafter "State Bar Code") Disciplinary Rule 2-102(A)(6) prohibitions on lawyer advertising.

Plaintiffs, recognizing that few, if any, Arlington County attorneys would risk professional disciplinary sanctions by sending information for use in a publication which would violate State Bar Code rules, ". . . seek a declaration that the defendants have violated the First and Fourteenth Amendment rights of the plaintiffs and their members to gather, publish and receive factual information in reference to attorneys practicing in Arlington County, Virginia, and seek additionally an injunction permanently enjoining the enforcement and operation of [State Bar Code Disciplinary Rule 2-102(A)(6)] . . . Jurisdiction over the action is premised on 28 U.S.C. § 1343(3)." *Consumers Union, supra,* 427 F. Supp. at 508.

First Amendment Claims:

In this Court's previous, now vacated opinion, the majority held that both the non-fee information[2] and the information on attorneys' initial consultation fees which plaintiffs sought to include in their directory was commercial speech protected by the First Amendment, and made applicable to the states through the Fourteenth Amendment. This Court found that State Bar Code Disciplinary Rule 2-102(A)(6) (hereinafter "State Bar Code DR2-102(A)(6)" or "DR2-102(A)(6)") was overbroad and unconstitutionally infringed upon plaintiffs' rights to receive and gather consumer information. The Court therefore permanently enjoined defendants from enforcing the State Bar Rules and

Regulations against publishing such information. *Consumers Union, supra,* 427 F. Supp. at 523.

Bates v. *State Bar of Arizona,* 433 U.S.C. 350 (1977), reinforces our prior opinion as to the unconstitutionality of the State Bar Rules' prohibition against publication of both the non-fee information and attorneys' initial consultation fees information at issue in this case. The Court therefore reinstates and reissues its original opinion and order as to these issues. *See Consumers Union, supra,* 427 F. Supp. at 517-523.

Furthermore, in light of *Bates,* this Court holds that plaintiffs are entitled to gather and publish, and their members are entitled to receive, truthful information as to the fees at which the listed lawyers will perform the routine legal services enumerated in plaintiffs' questionnaire.[3]

> The heart of the dispute before us today is whether lawyers may constitutionally advertise the *prices* at which certain routine services will be performed . . . whether the State may prevent the publication in the newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained . . . .

Bates, supra, 433 U.S. at 367-68, 384. (Emphasis the Court's).

Attorneys Fees:

Plaintiffs have asked this Court to grant them reasonable counsel fees, as well as their costs in prosecuting this action. Defendants have not opposed plaintiffs' motion that defendants be ordered to pay costs.[4] Indeed, it is well established that a federal court may tax costs against state parties to federal law suits, in the same way that it may tax costs

against any other federal court litigant. *See e.g.,* Rule 54(d), Federal Rules of Civil Procedure; *Hutto* v. *Finney,* 437 U.S. 678, 696 (1978); *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70, 77 (1926); *Samuel* v. *University of Pittsburgh,* 538 F.2d 991, 999 (3rd Cir. 1976).

Defendants do contend, however, that this Court may not, or, in the alternative, should not, allow plaintiffs to recover attorneys fees from defendants. The Civil Rights Attorneys' Fees Awards Act provides that

> . . . In any action or proceeding to enforce a provision of Section . . . 1983 . . . of this Title (42 U.S.C.), . . . the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as *part of the costs.*

42 U.S.C. § 1988 (1976) (emphasis added).

Despite the broad language of 42 U.S.C. § 1988, giving this Court discretion in "any action or proceeding" under 42 U.S.C. § 1983, to allow the prevailing party attorneys fees as part of costs, the state defendants assert that the doctrines of sovereign immunity, judicial immunity, and "good faith" immunity preclude awarding attorneys fees against them. *Hutto* v. *Finney,* 437 U.S. 678 (1978), decided after defendants filed their brief in this case, held that neither the sovereign immunity nor "good faith" defenses insulated state defendants, when sued in their official capacities, from liability for attorneys fees under 42 U.S.C. § 1988. *See Hutto* v. *Finney,* at 693-700.

The only remaining issue raised by defendants as to this court's jurisdiction, under 42 U.S.C. § 1988, to order that defendants pay plaintiffs reasonable attorneys fees is whether defendants are protected by judicial immunity from such an award. Defendants I'Anson, Dobbins and Lillard, sued in both their official and their individual capacities, are ab-

solutely immune, in their individual capacities, from personal liability for plaintiffs' attorneys fees. "Awards against the official in his individual capacity, in contrast, were not to be affected by the statute (42 U.S.C. § 1988)". *Hutto* v. *Finney,* 437 U.S. at 700. Defendant I'Anson, as Chief Justice of the Supreme Court of Virginia, is clearly immune, in his individual capacity, from all liability—damages, attorneys fees and other costs—for all of his "judicial acts."

> As early as 1872, the Court recognized that its was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself."

Stump v. *Sparkman,* 435 U.S. 349, 355 (1978), *quoting Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335, 347 (1872).

The record reflects that defendant Supreme Court of Virginia has the jurisdiction to adopt, modify, or refuse to modify the Virginia Code of Professional Responsibility. *See* Virginia Code § 54-48 (1974). Chief Justice I'Anson's actions, as a member of the Supreme Court of Virginia, relating to the Court's failure to amend or repeal DR2-102(A)(6), were clearly judicial acts within the Court's jurisdiction; Chief Justice I'Anson therefore in the instant case enjoys absolute judicial immunity from individual liability for attorneys fees.

Defendants Dobbins and Lillard likewise have absolute immunity, in their individual capacities, for their acts as officers of the State Bar. The State Bar is the state administrative agency through which the Supreme Court of Virginia regulates the practice of law in that state. The State Bar, in recommending rules and rule changes to the Supreme Court of Virginia, and in interpreting those rules for its members,

acts both at the direction of the court and as a quasi-judicial body. Its members, in the exercise of those quasi-judicial functions are immune from personal liability. *See Butz* v. *Economou,* ..... U.S. ....., 98 Sup. Ct. 2894 (1978); *McCray* v. *Maryland,* 456 F.2d 1 (4th Cir. 1972).

Defendants State Bar and Supreme Court of Virginia, as well as defendants Dobbins, Lillard and I'Anson, in their official capacities, however, are not immune from liability for attorneys fees. Both the extensive legislative history of 42 U.S.C. § 1988, as well as the numerous court opinions interpreting the statute clearly indicate that all branches and agencies of state governments may be liable for attorneys fees in 42 U.S.C. § 1983 actions.

The Civil Rights Acts, to be effective, depend heavily upon enforcement by private parties such as the instant plaintiffs.

> . . . fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. . . . If private citizens are to be able to assert their civil rights, . . . citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S.Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5910.

In *Pierson* v. *Ray,* 386 U.S. 547 (1967), the Supreme Court recognized that Congress had the power to abolish the common law immunity defenses in actions for damages under 42 U.S.C. § 1983. The Court found, however, that the judicial immunity defense was still viable in 42 U.S.C. § 1983 actions for damages, because the legislative record of 42 U.S.C. § 1983 gave ". . . no clear indication that Congress meant to abolish wholesale all common-law immunities." *Pierson* v. *Ray,* 386 U.S. at 554.

In contradistinction to the silence of the legislative record on common law immunities from damages under 42 U.S.C. § 1983, discussed in *Pierson* v. *Ray,* the legislative record of 42 U.S.C. § 1988 clearly enunciated Congress's intention to make all common law immunities inapplicable in 42 U.S.C. § 1988 actions for attorney fees.

> . . . *Fee awards are therefore provided in cases covered by S.2278 (42 U.S.C. § 1988)* in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5 . . . [D]efendants in these cases are often State or local bodies or state or local officials. In such cases it is intended that the attorneys' fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S.Rep. No. 94-1011, at 5, U.S. Code Cong. & Admin. News, 1976, at 5913. (Footnotes omitted and emphasis added).

The instant action is one brought under 42 U.S.C. § 1983, a case "covered by" 42 U.S.C. § 1988, and therefore a case in which attorneys fees normally should be awarded to the prevailing plaintiffs. The previously quoted language of the statute itself reinforces this interpretation. "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws." *Hutto* v. *Finney,* 437 U.S. 678, 694 (1978).

Furthermore, statements in the congressional record specifically reject extending *Pierson* v. *Ray* judicial immunity from damages to 42 U.S.C. § 1988 actions for attorneys fees.

> . . . [I]n some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy[17] [citing *Pierson* v. *Ray,* 386 U.S. 547 (1967)]. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases . . . only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976).

In light of the clear wording of the statute and the extensive legislative history of 42 U.S.C. § 1988, we hold that this Court has the authority to order the state defendants in this case to pay plaintiffs' reasonable attorneys fees. *See also, Alsager* v. *District Court,* 447 F. Supp. 572 (S.D. Iowa 1977) (attorneys fees awarded under 42 U.S.C. § 1988 against defendants, including the county court and the county court judge); *White* v. *Crowell,* 434 F. Supp. 1119 (W.D. 1977) (*per curiam*) (three judge district court awarded 42 U.S.C. § 1988 attorneys fees against the State of Tennessee for the state legislature's unconstitutional ad hoc partial reapportionment).[5]

Defendants next contend that this Court should exercise its discretion to deny plaintiffs' request for attorneys fees. 42 U.S.C. § 1988 provides that, in any action brought under 42 U.S.C. § 1983, ". . . the Court, in its discretion, *may allow* the prevailing party . . . a reasonable attorney's fee as part of the costs." (Emphasis added).

A court, in exercising its discretion, should ordinarily award reasonable attorneys fees to a prevailing civil rights plaintiff ". . . unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). This standard is applicable in all 42 U.S.C. § 1988 actions for attorneys fees. S.Rep. No. 94-1011, at 4, U.S. Code Cong. & Adm. News, 1976, at 5912; H.Rep. No. 94-1558, at 6 (1976); *Morrow* v. *Dillard,* 580

F.2d 1284, 1300 (5th Cir. 1978); *Wharton* v. *Knefel,* 562 F.2d 550, 557 (8th Cir. 1977).

Defendants cite several factors which they contend constitute "special circumstances" which would render unjust an award of attorneys fees to plaintiffs. Defendants first assert that a "special circumstance" is the importance of maintaining the independence of the state judiciary to regulate the practice of law. Awarding attorneys fees in this case, so defendants contend, would promote undue timidity in interpreting those regulations.

We find this argument unpersuasive. All state officials and governmental units subject to 42 U.S.C. § 1983 suits are entrusted with safeguarding citizens' constitutional rights. Those, including defendants, who must exercise discretion in performing their legislative, executive or judicial duties are afforded varying degrees of immunity from damage actions, so that they may exercise that discretion without fear of personal consequences. 42 U.S.C. § 1988 did not affect the common law immunities from damages, but provided that such immunities would be inapplicable in 42 U.S.C. § 1988 actions for attorneys fees. H.Rep. No. 94-1558, p.9 (1976), *supra.*

If this Court held that defendants were immune from being required to pay plaintiffs' attorney fees, the result would be that private parties with meritorious civil rights claims against governmental defendants would be prevented by the specter of substantial legal costs from bringing civil rights actions for injunctive relief. This is precisely the impediment to private enforcement of the Civil Rights Acts which Congress, through 42 U.S.C. § 1988, sought to eradicate. "If successful plaintiffs were routinely forced to bear their own attorneys fees, fewer aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." H.Rep. No. 94-

1558 at 6 (1976), *quoting Newman* v. *Piggie Park Enterprises, Inc., supra.*

Defendants additionally state that it is merely fortuitous that the instant case was pending at the time the 42 U.S.C. § 1988 attorney fee provision was enacted, as the case was tried five months previous to the attorneys fee act becoming law. This argument is irrelevant to any discussion of "special circumstances", however, since Congress clearly intended the act "to apply to all cases pending on the date of enactment. . . ." H. Rep. No. 94-1558, at 4, n.6 (1976), *citing Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1976); *Hutto* v. *Finney,* 437 U.S. 678, 695 n.23 (1978); *Burt* v. *Abel,* 585 F.2d 613, 617 (4th Cir. 1978).

Defendants argument that plaintiffs should not receive attorneys fees because their own staff counsel, and not outside attorneys, prepared the case, is equally without merit. The Civil Rights Acts provide for awards of attorneys fees to prevailing plaintiffs regardless of whether the plaintiffs' organizational counsel prosecuted the action, or whether the plaintiffs were represented by attorneys of a public interest organization. *See Reynolds* v. *Coomey,* 567 F.2d 1166, 1167 (1st Cir. 1978); *Tillman* v. *Wheaton-Haven Recreation Association, Inc.,* 517 F.2d 1141, 1147-48 (4th Cir. 1975).

Finally, defendants contend that they should not be ordered to pay attorneys fees because plaintiffs accomplished nothing of any public benefit in the instant case. *See, Zarcone* v. *Perry,* 581 F.2d 1039 (2d Cir. 1978), *cert. denied,* ..... U.S. ....., 47 U.S.L.W. 3464 (1979); *Naprstek* v. *City of Norwich,* 433 F. Supp. 1369 (N.D.N.Y. 1977). Defendants claim that the matters on which plaintiffs have prevailed in the instant case add virtually nothing to the holding in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977).

Defendants' contentions that plaintiffs' suit has resulted in

little or no benefit to the public are totally at odds with the facts. Palintiffs brought this suit because defendant State Bar had ruled that DR2-102(A)(6) made it inappropriate for Virginia lawyers to include their names and information, which this Court has held to be constitutionally protected, in a legal directory. The directory was to be published as a public service to Arlington County area consumers, and was to be sold at its cost of production. As a result of the State Bar's interpretation of DR2-102(A)(6), few, if any, Arlington County lawyers would respond to Consumers Union's questionnaire.

Not only was the public deprived of constitutionally protected information at the time this suit was instituted, but the deprivation continues to this day.

Defendant Supreme Court of Virginia still has not amended the Virginia Code of Professional Responsibility to conform to the requirements of the Constitution as enunciated in *Bates,* and the Consumers Union directory has yet to be published. In December, 1978, a Virginia Beach, Virginia attorney was indicted under two Virginia statutes for publication of an advertisement that was virtually identical to the advertisement which the Supreme Court in *Bates* found constitutionally protected, but which DR2-102(A)(6) still prohibited. The chilling effect of DR2-102(A)(6) on First Amendment freedoms is yet extant, even if not subject to objective calculations.

Recognizing, as discussed earlier, that good faith is not a defense to 42 U.S.C. § 1988 liability for attorneys fees, nonetheless special circumstances would make unjust any award of attorneys fees against defendant State Bar or against defendants Dobbins and Lillard in their official capacities as State Bar officers. The Supreme Court of Virginia, and not defendants State Bar, Dobbins or Lillard, has the power to change the State Bar Code disciplinary rules. The record

reflects that defendant State Bar and its appropriate officers endeavored to persuade the Supreme Court of Virginia to amend DR2-102(A)(6) to conform to what they deemed to be constitutional guidelines. Defendant Lillard presided over a committee of the Virginia State Bar which recommended to the State Bar council that DR2-102(A)(6) be amended; defendant Dobbins presided over the State Bar council which petitioned the Supreme Court of Virginia to change DR2-102(A)(6). Despite these entreaties, the Supreme Court of Virginia declined to amend DR2-102(A)(6). Under these particular facts, it would be unjust to require the State Bar defendants to pay plaintiffs' attorneys fees. *See Chastang* v. *Flynn and Emrich Co.,* 541 F.2d 1040, 1045 (4th Cir. 1976).

Similiar circumstances, however, are not present to make unjust an award of attorneys fees against the Supreme Court of Virginia in its official capacity, and defendant Chief Justice I'Anson in his official capacity. The Supreme Court of Virginia has yet to amend State Bar Code DR2-102(A)(6) to conform with the clear constitutional requirements of *Bates*—a decision handed down June 29, 1977, more than twenty months ago. Indeed, this district court, in the interest of comity has delayed the instant opinion to the point that any further delay would be, as we view it, dereliction of our responsibilities.

The Supreme Court of Virginia, too, denied defendant State Bar's petition to amend DR2-102(A)(6) to conform with the American Bar Association proposals and the perceived constitutional requirements of *Bigelow* v. *Virginia,* 421 U.S. 809 (1975), a case which set forth certain First Amendment protections for commercial speech. It would hardly be unjust to order the Supreme Court of Virginia defendants to pay plaintiffs reasonable attorneys fees in light of their continued failure and apparent refusal to amend

State Code DR2-102(A)(6) to conform with constitutional requirements.

Counsel for the Supreme Court of Virginia defendants and counsel for plaintiffs will be directed to attempt to reach an agreement on a reasonable sum as plaintiffs' attorneys fees, and to submit any such agreement to this Court. In the event the parties fail to reach agreement, this Court shall determine an appropriate sum to which plaintiffs are entitled.

An appropriate order shall issue.

Date: May 8, 1979

FOOTNOTES

[1] Plaintiffs also brought suit against the American Bar Association (hereinafter "ABA"). This Court, in its December 17, 1976 opinion and order, dismissed the ABA as a party defendant. After the Supreme Court vacated this Court's opinion and order, and remanded the case for reconsideration in light of *Bates* v. *State Bar of Arizona,* this Court entered an order, filed August 17, 1978 with the agreement of Consumers Union and the state defendants, again dismissing the ABA for the reasons set forth in the prior opinion.

[2] The non-fee information which plaintiffs seek to include in their directory is the attorney's background, education, legal activities, affiliations, law firm, nature of practice, substantive areas of practice, office hours, knowledge of foreign languages, billing and credit arrangements, and handling of client complaints.

[3] The questionnaire asks ". . . information on the average fee charged for a number of common legal services, such as change of name, individual bankruptcy, representation of the complainant in an uncontested divorce, and closing and settlement on the sale of a single-family house." *Consumers Union of United States, Inc.* v. *American Bar Association,* 427 F. Supp. 506, 511 (E.D. Va. 1976).

[4] ". . . [D]efendants . . . for their response to plaintiffs' motion for an order declaring defendants' liability for fees and costs, say that an award of attorneys fees should be denied for the reasons stated in the attached brief". Defendants' "Response To Motion For an Order Declaring Defendants' Liability For Fees and Costs."

[5] Just as judges have absolute immunity from damages in § 1983 suits for "judicial acts", so too do legislators have absolute immunity from damages for acts performed within their legislative roles. *Tenney* v. *Brandhove,* 341 U.S. 367 (1951).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Filed May 8, 1979

VA. CITIZENS CONSUMER COUNCIL

v.

AMERICAN BAR ASSOCIATION, ET AL

CLERK, U. S. DIST. COURT
RICHMOND, VA.

Civil Action No. 75-0105-R

WARRINER, J., DISSENTING IN PART AND CONCURRING IN PART

I agree with the decision of the majority that special circumstances render an award of attorney's fees against the Virginia State Bar unjust. I believe, however, that the majority has misapprehended the nature of the immunity enjoyed by defendant Virginia Supreme Court in this matter, and so I respectfully dissent from the award of attorneys' fees against that defendant.

I

Central to the maority's analysis is the proposition that an award of fees is authorized in this case by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (hereinafter called the Act), because Congress in passing that Act specifically intended to abrogate judicial immunity from awards of Attorneys' fees. I do not believe, however, that this question need be reached because it is my view that the immunity enjoyed by the Supreme Court under the facts of

this particular case is legislative immunity and not judicial immunity.

Plaintiffs in this action sought a declaratory judgment that certain rules prescribed by the Supreme Court for the governance of the professional conduct of attorneys-law were unconstitutional, and for an injunction against the enforcement of those rules. The Supreme Court of Virginia was made a party to this action by virtue of the fact that it "adopted and promulgated the State Bar Code, purporting to act under the authority of § 54-48 of the Virginia Code." Complaint at p. 4. No other cause of action is alleged against the Supreme Court of Virginia. Thus, it is for the act of adopting and promulgating DR 2-102(A)(6) that the Supreme Court of Virginia was made a party to this action and for which the majority now holds it liable for attorneys' fees.

In enacting the disciplinary rule challenged in this law suit, the Supreme Court of Virginia acted pursuant to the authority granted to it in Va. Code § 54-48(b) (1978 Repl.)[1] That section specifically empowers the Supreme Court to prescribe a code of ethics for attorneys-at-law. This Court has previously indicated that the Supreme Court of Virginia acts in a legislative capacity in adopting disciplinary rules. *Hirschkop* v. *Va. State Bar,* 421 F.Supp. 1137, 1156 (E.D. Va. 1976), *rev'd on other grounds,* ..... F.2d ..... (4th Cir. No. 76-2016, Mar. 3, 1979). This view is readily supported

[1] § 54-48. *Rules and regulations defining practice of law and prescribing procedure for practice by law students, codes of ethics and disciplinary procedure.*—The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

. . .

(b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law including the practice of law or patent law through professional law corporations, professional associations and partnerships, and a code of judicial ethics.

by analysis. Disciplinary rules are rules of general application and are statutory in character. They act not on parties litigant but on all those who practice laws in Virginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. It is evident that, in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature.

I now face the problem of whether the Supreme Court of Virginia, acting in a legislative capacity, enjoys legislative immunity. There is no doubt that it does. In *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 47 U.S.L.W. 4256 (U.S., Mar. 6, 1979), the Supreme Court held that the appointed members of a governing body of a regional planning agency were entitled to legislative immunity against a suit for damages under 42 U.S.C. § 1983. The Supreme Court in *Lake Country Estates* rejected a narrow, formalistic view of legislative immunity in favor of a view that legislative immunity was to be accorded where the function complained of was a legislative function. The Court said: "[T]o the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damage liability." 47 U.S.L.W. at 4260.

In so holding, the Supreme Court followed closely the reasoning of *Butz* v. *Economou,* 57 L.Ed.2d 895 (1978), which teaches that it is the function of the official, and not his title, which controls the nature of his immunity. In *Butz,* the Supreme Court held that employees of the Executive Branch serving as administrative law judges and hearing examiners for administrative agencies enjoy judicial immunity. The Court reached this conclusion by an analysis of the work of hearing examiners and administrative law

judges finding their role was "functionally comparable" to that of a judge. The Supreme Court also held that agency officials performing functions analogous to those of a prosecutor should be able to claim the prosecutorial immunity established by the Supreme Court in *Imbler* v. *Pachtman,* 424 U.S. 409 (1976). The Court spoke of the functions of such officials being very much like the functions of a prosecutor in a criminal law context.

In *Briggs* v. *Goodwin,* 569 F.2d 10 (D.C. Cir. 1977) the question presented was whether a prosecutor was entitled to the absolute immunity accorded him in his quasi-judicial status under *Imbler,* or whether he was merely entitled to the qualified immunity typically conferred on other investigative officers. The court held in *Briggs* that the prosecutor was not entitled to absolute immunity because the act on which the suit was based was not one done in the course of exercising prosecutorial discretion. Thus, the quality of the immunity depended not upon the title of the officer but instead upon the nature of the function being discharged. This distinction was earlier recognized by the Fourth Circuit in *Eslinger* v. *Thomas,* 476 F.2d 225, 228 (4th Cir. 1973). There a State lieutenant governor was found to be entitled to legislative immunity when he was acting as president of the State senate.

This analysis is, of course, nothing more than a common sense approach to the question of official immunity. These immunities are the creature of public policy, and depend necessarily upon the function being performed by the official when he does the acts for which he is called upon to answer. The title of the office in no way determines the scope and character of the privilege enjoyed by the incumbent. Thus, the fact that the Supreme Court of Virginia is comprised entirely of judges does not determine the scope and character of the privilege enjoyed by the Supreme Court when it enacts

disciplinary rules. If the function is legislative, then the applicable privilege is the legislative privilege.

II

To properly understand the scope and nature of legislative immunity one must examine its origin and purpose.

According to Chief Justice Warren, "absolute legislative privilege dates back to at least 1399." *Barr* v. *Matteo,* 360 U.S. 564, 579 (1959) (Warren C.J., dissenting). During the struggle between Parliament and Crown in the 17th Century the privilege of those engaged in legislating to be free of the fear of arrest or civil process as a result of their legislative activity crystalized. The Bill of Rights which followed the Glorious Revolution of 1688 established the privilege unequivocally. "That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." W. and M. 2, c. 2, (1689).

The tradition of legislative immunity was equally strong in the Colonies. It was embodied in Article V of the Articles of Confederation and Article 1, § 6 of the Federal Constitution. *Tenney* v. *Brandhove,* 341 U.S. 367, 372 (1951). Today, most state constitutions, including that of Virginia, establish this legislative immunity. Va. Const. art. IV, § 9.

Tenney, in its explanation for reaffirming state legislative immunity, quotes from the works of James Wilson, an influential member of the committee which was responsible for incorporating legislative immunity into the Federal Constitution.

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be

> protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence. II Works of James Wilson (Andrews ed 1896) 38. *Tenney,* 341 U.S. at 373.

Tenney also quotes with approval an explanation of the privilege expounded by Chief Justice Parsons in *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808) in the early 19th century.

> These privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal. I therefore think that the Article ought not to be construed strictly, but liberally, that the full design of it may be answered. *Tenney,* 341 U.S. at 373-74.

This understanding that the broad application of legislative immunity is central to the proper functioning of representative government is one that arose in the midst of ancient parliamentary struggles and has been unquestioned in this country since the Revolution. It is a privilege which inures to the benefit of all of us. Legislative functions not free from the specter of judicial penalty and sanction cannot truly represent the wishes of the people. As noted by Justice Frankfurter, "[o]ne must not expect uncommon courage even in legislators." *Tenney,* 341 U.S. at 377. Legislators, being human, would be inhibited by the specter of penalty and sanction. It is to free the people's representatives[2] from such inhibiting effect that the privilege exists.

[2] As *Lake Country Estates,* 47 U.S.L.W. at 4260 makes clear, legislators need not be elected directly by the people to enjoy legislative immunity. They may be appointed, as in *Lake Country Estates,* or, as here, elected by the Virginia General Assembly. Va. Const. art. VI, § 7.

There is another fundamental basis for legislative immunity. This is the deeply imbedded doctrine of "separation of powers." The central place that legislative immunity holds in preserving effective separation of powers has been noted in Ervin, *The Gravel and Brewster Cases, An Assault on Congressional Independence,* 59 Va. L. R. 175, 181 (1973). Senator Ervin's article reiterates the historic basis and present necessity for a broad reading of legislative immunity and reminds us of its fundamental importance to our scheme of government.

The important role that legislative immunity plays in preserving separation of powers could not be better stated than it was by the Supreme Court in *United States* v. *Johnson,* 383 U.S. 169, 178-79 (1975).

> In the American governmental structure the clause serves the additional function of reinforcing the the separation of powers so deliberately established by the Founders.... The legislative privilege, protected against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the "practical security" for insuring the independence of the legislature.

Two crucial purposes then are served by legislative immunity: preservation of free and unhampered debate and decision making by the representatives of the people, and separation of powers among the various branches of government.[3]

[3] The appeal to separation of powers as a basis for immunity is not a mere shibboleth or talisman. Despite the majority's undoubted adherence to the principle of separation, a substantial portion of the majority opinion is spent complaining about the defendants' failure to promptly amend the offending rule after its constitutionality was implicated by *Bates.* The clear inference to be drawn from the majority plaint is that had the defendant, in its legislative capacity, bowed to the will of the courts, then they would not have been "punished" by the imposition of counsel fees, euphemistically labeled "costs."

III

Case law has established that the common law legislative immunity applicable to State legislators and the constitutional legislative immunity that Congress enjoys by virtue of the speech and debate clause are the same in scope. *Tenney,* which reiterated the ancient doctrine of common law legislative immunity and which serves as the modern landmark for any discussion of its scope and application, treats the constitutional and common law forms of legislative immunity identically. Its treatment of the history of the immunity illustrates that the constitutional immunity is an outgrowth and, in essence, is the constitutional embodiment of the common law privilege. *Tenney* discusses the constitutional and common law immunity interchangeably in applying the legislative immunity to members of the California legislature. Again, in discussing "the doctrine of legislative immunity, having its root as it does in the speech and debate clause of the Constitution," the Supreme Court looks to *Tenney* to define the scope of such immunity. *Dombrowski* v. *Eastland,* 387 U.S. 82, 84-85 (1967).

The Fourth Circuit has specifically held that the constitutional privilege has been extended to State legislators. In *Eslinger,* 476 F.2d at 228, the Court held that South Carolina legislators enjoy the same absolute legislative immunity as do members of Congress, extending even to immunity from suit itself. *U.S.* v. *Dowdy,* 479 F.2d 213, 226 (4th Cir. 1973) also treats constitutional and common law legislative immunity identically. The Sixth Circuit in *United States* v. *Gillock,* 587 F.2d 284, 286 (6th Cir. 1978) takes a similar position.

Only the Third Circuit, in the factual context of requiring Pennsylvania State legislators to obey a subpoena duces tecum issued by a federal grand jury investigating racketeering, makes a distinction between the immunity enjoyed by members of Congress and that enjoyed by State legislators. *In re Grand Jury Proceedings,* 563 F.2d 577, 581 (3rd Cir. 1977). It is beyond argument that this Court is bound by *Tenney* and *Eslinger* as controlling authorities, not a Third Circuit case in a different factual context. Accordingly, I believe that the scope of common law legislative immunity is identical to that of constitutional legislative immunity and that those legislating for the Commonwealth enjoy the same privileges in this regard as members of Congress.

Legislative immunity is the broadest sort of immunity. As Justice Frankfurter noted in *Tenney*: "the privilege would be of little value if they [legislators] could be a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney,* 341 U.S. at 377. The well-grounded fear of those who fought for and preserved legislative immunity is that those performing legislative functions, being merely human, might retreat from taking daring, innovative, or unpopular positions or, by contrast, might falter in adhering to long held principles, if faced with the "inconvenience and distractions of a trial."

As noted in the per curiam opinion in *Dombrowski,* 387 U.S. at 85:

> It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the speech and debate clause of the Constitution, *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1881) that legislators engaged in the sphere of legitimate legislative activity, *Tenney* v. *Brandhove, supra,* 341 U.S. at 376, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.

The Supreme Court has recently reiterated this broad sweep of legislative immunity in *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975).

> Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that members are acting within the 'legitimate legislative sphere' the speech and debate clause is an absolute bar to interference.

The breadth of the immunity cannot be surpassed and the importance of its broad scope has been continually reiterated. There is no injunction—damages dichotomy. Neither form of relief is available. The Fourth Circuit understands this. In *Eslinger,* 476 F.2d at 228-30, the Court, while holding an employee of the South Carolina legislature liable to suit though immune from damages, held that the president pro tempore, various State senators, and the lieutenant governor were absolutely immune from suit, for injunctive relief as well as for damages.

The Supreme Court has not only continually reiterated this broad scope of legislative immunity but has explained it in terms of its origin. Legislative immunity is wholly different from judicial and executive immunity. In *Scheuer* v. *Rhodes,* 416 U.S. 232, 239-50 (1974) the Court discussed the different origins of each of the three types of immunities

applicable to the different branches of government; legislative immunity, judicial immunity and executive immunity. It noted that executive immunity has traditionally been the most limited form while legislative immunity is absolute. In discussing the related subject of privilege from libel actions, Chief Justice Warren noted that "[t]he history of the privileges conferred upon the three branches of government is a story of uneven development. Absolute legislative privilege dates back to at least 1399. . . . The absolute immunity arising out of judicial proceedings existed at least as early as 1608 in England. But what of the executive privilege?" *Barr* v. *Matteo,* 360 U.S. 564, 579-80 (1959) (Warren, C. J., dissenting).

IV

The majority opinion in this case quotes from the Senate Committee report as follows:

> [D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party). S.Rep.No. 94-1011, at 5, U.S. Code Cong. & Admin. News, 1976, at 5913. (Footnotes omitted).

This language indicates that Congress intended for governmental officials who have been held liable for attorneys' fees to turn to the government that employs them to pay the needed money. Does this intention not to make the officials sued personally liable negate either the reasons for legislative immunity or the necessity that such immunity be of the broadest scope? I do not believe so.

That the Senate Report intends that officials liable for attorneys' fees be able to turn to their employer agency or government for succor does not guarantee that such help will be in all instances forthcoming. Thus legislators would not be certain of being able to turn to the State for the needed money and the inhibiting effect on them, deplored by all who enshrined the privilege in our jurisprudence, would be present. And as recently noted by the Supreme Court in *United States Servicemen's Fund,* 421 U.S. at 503, the mere liability of the legislator to the annoyance of suit, not just the ultimate payment of money, has a disruptive and inhibiting effect on legislators. Even if the congressional committee envisions a "pass-through judgment" State policy may not willingly fall in line. *See, Hutto* v. *Finney,* 57 L.Ed.2d 522, 546 at n. 7 (Powell, J., dissenting) and at 550-1 (Rehnquist, J., dissenting) (1978). And if the State does comply with the federal vision, legislators would undoubtedly be subject to influence to avoid incurring the expense. Thus directly or indirectly the judiciary would hold unwonted sway over legislators. That such inhibiting effects are likely even if the government ultimately pays the judgment for attorneys' fees is sufficient to convince me that the centuries old policy reason for legislative immunity is not to be negated by any congressional intent to ultimately shift the payment burden to the State.

The fact that the legislator may turn to the State to collect the money to pay the plaintiff's attorneys' fees also in no way lessens the separation of powers rationale for the immunity. Whoever ultimately pays the attorneys' fees, the dangers inherent in a judicial ordering of such payment remains. Thus, whether Congress intended the legislator to pay the attorneys' fees or the State treasury to ultimately bear the burden, the policy behind legislative immunity and the

necessity that such immunity be absolute would be severely impaired.

Historically, the broadest application of legislative immunity has been extended to those doing the legislating. In *Kilbourn, Tenney, Dombrowski, United States* v. *Brewster,* 408 U.S. 501 (1972) and *United States* v. *Gravel,* 408 U.S. 606 (1972), the Supreme Court has recognized that those who are not legislating, *e.g.,* employees of the legislative branch, do not enjoy the same expansive scope of immunity enjoyed by legislators. Recently, however, in *United States Servicemen's Fund,* 421 U.S. at 507-508, the Court extended absolute legislative immunity to the chief counsel of a legislative committee. The Court noted that aides who are essential to the legislative process are equally immune with those doing the legislating.

No matter what the scope of protection afforded to aides to legislators, it is the Justices of the Supreme Court of Virginia in this case who have legislated and who are named as parties defendant. The full scope of legislative immunity applies to the Justices when acting in their legislative capacity, as here. Accordingly, I would hold that the Justices of the Supreme Court are entitled to legislative immunity, which is absolute, in this action.

V

Since the majority believed this to be a case involving judicial immunity, it did not deal with the Act *vis-a-vis* legislative immunity. The Act reads as follows:

> In any action or proceeding to enforce a provision of [42 U.S.C. §§ 1981-1983, 1985, 1986, 20 U.S.C. §§ 168 *et seq.*] or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the

> United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Since I hold that defendants were clothed with legislative immunity it is necessary that I address the question: Does this statute abrogate legislative immunity?

The question involves, inter alia, fathoming the intent of Congress when it enacted the statute. *Tenney,* in considering the impact of 42 U.S.C. § 1983 on legislative immunity, looked to the intent of Congress when it passed the Civil Rights Act of 1871. Here we must look to the intent of Congress when it passed the Civil Rights Attorney's Fees Award Act. I think Congress neither intended to abrogate legislative immunity nor had any reason to do so since legislative immunity does not frustrate any congressional objective embodied in the Act.

The words of the statute itself say nothing about immunities, legislative or otherwise. However, as my purpose is to discern the intent of Congress, I have searched the debates and committee reports for the light they throw on Congress' intent.

The only portion of the legislative history which directly mentions immunities is in the House report from the Committee on the Judiciary. On page 9 the report reads as follows:

> Furthermore, while damages are theoretically available under the statutes covered by H. R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17]

Footnote 17 reads as follows:

> *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Scheuer* v. *Rhodes,* 416 U.S. 23 (1974); *Pierson* v. *Ray,* 386 U.S. 547 (1967). H. Rep. No. 94-1558, at 9, 1976.

This language establishes that the House Judiciary Committee believed that the language of the bill would, to some extent, override immunities. The only indication of which immunities the House Judiciary Committee had in mind is furnished by the cases noted in footnote 17.

Wood dealt with the immunity enjoyed by school officials, in particular school board members. In deciding the proper scope of their immunity, the Supreme Court was considering the proper scope of executive immunity. The opinion in *Wood* specifically distinguished executive immunity from the stronger legislative and judicial immunities. *Wood,* 420 U.S. at 316-317.

In *Scheuer* the Court was again construing the proper scope of executive immunity. The Court specifically noted that legislative immunity is far stronger and more encompassing than executive immunity. *Scheuer,* 416 U.S. at 240-41.

Finally, the House Judiciary Committee report cites *Pierson* v. *Ray,* 386 U.S. 547 (1967). *Pierson* dealt with the scope of immunity appropriate to judges acting in their judicial capacity and to police officers acting in their executive capacity. *Pierson* does not consider or mention the matter of legislative immunity. Thus the cases cited by the committee not only did not deal with legislative immunity, two out of the three specifically called attention to the fact that legislative immunity is qualitatively different from executive and judicial immunity.

It must be recalled from the discussion above that legislative immunity is qualitatively different from the other immunities; it serving as a shield from suit itself. *United States Servicemen's Fund,* 421 U.S. at 503; *Dombrowski,* 387 U.S.

at 85. And it can only be assumed that Congress, itself entitled to the immunity, understood this when legislating and would not have abrogated such a privilege by a non-specific reference in a committee report.

There are other indications from the congressional debates that the radical change required for plaintiffs to recover was not intended by the Congress. Senator Kennedy, sponsor of the legislation, explained its purpose as restoring the law to its "pre-*Alyeska*" state.[4] *Alyeska Pipe Line Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). Specifically Senator Kennedy noted, "This bill would close a series of loopholes in our civil rights laws created by the Supreme Court's *Alyeska* decision last year". 122 Cong. Rec. § 516251-52 (1976). This was echoed by Senator Mathias, Republican member of the Senate Judiciary Committee and a strong supporter of the legislation. Senator Mathias noted that,

> The need for this bill arises from a recent Supreme Court decision which has erected a formidable financial barrier against those seeking access to Federal courts and has consequently dealt a serious blow to the effective enforcement of our civil rights laws . . . I believe that S.2278 [the legislation in question] constitutes a much needed response to *Alyeska* and is necessary to guarantee the proper enforcement of our civil rights laws which the Congress has so earnestly labored for in the past. 122 Cong. Rec. S 16251 (1976).

Reading through the House and Senate debates as well as the House and Senate committee reports gives me the clear impression that the purpose of the legislation was to return the law to what Congress considered it to be prior

[4] It is interesting to note that the Supreme Court considered the question in *Alyeska* to be whether it should formulate new law concerning attorneys' fees or whether it should affirm the "American" rule. The Court chose not to change the law and re-affirmed the traditional "American" rule. Alyeska, 421 U.S.

to *Alyeska*.[5] Had Congress intended to do more, there would be evidence in the record.

There is no logical reason for Congress to have intended to override legislative immunity because no objective that Congress had in mind when it passed the Civil Rights Attorney's Fees Awards Act is frustrated by legislative immunity. Congress intended to encourage the private enforcement of the civil rights statutes. 122 Cong. Rec. S 16252 (1976).

The failure to enforce civil rights laws and the enforcement of laws and customs which violate civil rights is activity, or lack thereof, engaged in by those enforcing the laws or those interpreting the laws; that is, those acting in an executive or judicial capacity. Here, it is the Virginia State Bar that has acted to enforce the law. So in all cases there must be someone enforcing the law, or failing to, and it is that enforcing official who may properly be sued. Thus, the vindication of civil rights by private enforcement that Congress intended is accomplished by suit against those acting in an executive and, sometimes, judicial capacity. Even where a law is on the books which is not being enforced but the possibility of enforcement chills the exercise of rights, it is the official with the power to enforce who can give the plaintiff the relief he seeks: assurance against enforcement. Thus the absence of a right to counsel fees against those acting in a legislative capacity in no way negates what Congress intended. Accordingly, there is no logical reason to assume, especially since no other indications are present, that Congress intended attorneys' fees to be collected against those who enacted the law no matter what their motive.

[5] See: S. Rep. No. 94-1011, at 1, 4, 1976; 121 Cong. Rec. S 14975 (1975); 122 Cong. Rec. S 16251, S 16252, S 16254, S 16431, S 16432, S 16492, S 16664, S 17052 (1976); H. Rep. No. 94-1558 at 2, 1976; 122 Cong. Rec. H 12150, H 12151, H 12154, H 12155, H 12159, H 12160, H 12161, H12162, H 12163, H 12164, H 12165 (1976).

In summary, there is no specific language in the statute that evidences any intent on the part of Congress to abrogate legislative immunity, no indication that the language of the House Committee Report applies to legislative immunity, no indication that Congress intended to do more than return the law to what it considered it to be prior to *Alyeska,* and no policy reason for awarding attorneys' fees against those acting in a legislative capacity since plaintiffs can in a proper case be awarded fees from the executive officials who are depriving plaintiffs of their rights. Accordingly, I am convinced that Congress did not intend to abrogate legislative immunity in regard to the award of attorneys' fees.

That Congress' intent was not to abrogate legislative immunity in this case is bolstered by my opinion that to do so could raise a constitutional question. In *Tenney,* Justice Frankfurther raised that constitutional question. "Let us assume, merely for the moment, that Congress has constitutional powers to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption." *Tenney,* 341 U.S. at 376. I do not think that this Court should make that "big assumption" nor can I assume that Congress intended to raise that question when passing the Act. Had Congress thought that the Act raised constitutional problems by abrogating legislative immunity the subject would most likely have arisen somewhere in committee or on the floor.

Just this term in *NLRB* v. *Catholic Bishop of Chicago,* 59 L.Ed.2d 533, 541 (1979), the Supreme Court again emphasized that only when "the affirmative intention of Congress clearly expressed" requires a constitutional resolution, should the courts assume there is a constitutional question. Unless the congressional interest necessarily raises a constitutional issue, the enactment should be construed in such a way as to avoid any conflict between the statute and the

Constitution. In *Catholic Bishop of Chicago,* 59 L.Ed.2d at 545, the Court said, "We decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Catholic Bishop of Chicago,* 59 L.Ed.2d at 545. So here I think we should construe the Civil Rights Attorney's Fees Awards Act in a manner that avoids raising a constitutional issue involving legislative immunity. Accordingly, for the additional reason that to hold otherwise would raise a constitutional issue, I am convinced that Congress evinced absolutely no intention of abrogating legislative immunity by the passage of this statute.

VI

I believe that the above discussion amply demonstrates that the Supreme Court of Virginia is immune from an award of attorneys' fees in this action by reason of its legislative immunity. I believe that the foregoing discussion represents accurately the state of the law on this question. However, the Supreme Court of Virginia has never raised its legislative immunity as a bar to suit in some four years of litigation in this case. If the failure so to raise legislative immunity constitutes a waiver of that defense, then the Supreme Court may be held liable for attorneys' fees despite its immunity as described above.

Two considerations militate against a waiver in this case. First, I believe that the legislative immunity which protects the Supreme Court in this action "sufficiently partakes of the nature of a jurisdictional bar" that it may and should be raised by this Court *sua sponte. See, Edelman* v. *Jordan,* 415 U.S. 651, 678 (1974); *Jacobson* v. *Tahoe Regional Planning Agency,* 566 F.2d 1353, 1361 (9th Cir. 1967), *rev'd. in part and aff'd. in part sub nom Lake Country Es-*

tates Inc., v. *Tahoe Regional Planning Agency*, 47 U.S.L.W. 4256 (U.S. Mar. 6, 1979). I have already discussed the nature of legislative immunity and have shown how legislative immunity differs in quality from both executive immunity and judicial immunity. Legislative immunity is grounded in the nature of the relationship between the coordinate branches of government in our republican system, whether on the federal or State level. Legislative immunity, as I have shown, is immunity from suit and not merely immunity from damages. In this way, it partakes of a jurisdictional bar and can be raised at any time in the litigation of the case, and may also be raised *sua sponte* by the court at any time.

The second reason that I am reluctant to find a waiver in this case is that legislative immunity is one which belongs to the public and is designed for the protection of the public. The policy which underlies legislative immunity has been explored at length above. It is my view that such an important immunity, rooted in the ancient precepts of the common law, embodied in the federal Constitution, and so necessary to the orderly functioning of a republican form of government, may not be waived by inadvertance or mistake. It is of such a nature that it may be waived only by a willful, knowing, and deliberate act of waiver. It appears that legislative immunity was not raised by the defendant Supreme Court of Virginia simply because the possibility of the highest court of the State invoking legislative immunity did not occur to those to whom the defense of this action was entrusted. This cannot be described as a knowing, willful, and deliberate waiver.

Furthermore, in *Eslinger*, 476 F.2d at 228, the Fourth Circuit rejected an argument that the defendants had waived their immunity by their failure to allege it formally in their answers to the complaint and the amended complaint. Thus,

there is no requirement that legislative immunity be raised in the pleadings. It is sufficient that the question of immunity be raised before the trial court. 476 F.2d at 228. It is my view that in raising judicial immunity, which the Supreme Court did with vigor, the Supreme Court placed the question of its immunity squarely before this Court. The defense raised was one of immunity. The authority cited, according to the majority, did not support the immunity claimed, but other authority existed that amply supports the immunity to which defendant is entitled. It would be extremely harsh for this Court to hold the Supreme Court of Virginia to some sort of election of defenses with respect to immunity. Accordingly, I believe that the Supreme Court should not be held to have waived its legislative immunity in this case.[6]

VII

I have heretofore indicated my reasons for believing that the Supreme Court of Virginia should not be required to pay plaintiff's attorneys' fees in this case. I have concurred in the majority view that the Virginia State Bar should not be held liable. The final question which remains is whether or not this Court is empowered to award attorneys' fees directly against a State in a case where such an award against the agency or officials of the State involved in the law suit is not appropriate, and in which the State itself is not a party.

This question arises out of some remarkable dicta found in the five-man majority opinion in *Hutto* v. *Finney*, 437 U.S. 678, 700 (1978). In *Hutto*, the Supreme Court affirmed

[6] Since I would hold that the Supreme Court of Virginia has not waived its legislative immunity, the Supreme Court of Virginia should be dismissed from this action entirely. I therefore dissent from the entry of any order against the Supreme Court, and I would dismiss the Supreme Court as a party to this action with its costs.

an award of attorneys' fees against certain named officials of the Arkansas Department of Corrections. After discerning that it was "obvious" that the award would be paid with State funds, the majority went on to indicate that the Arkansas Department of Corrections, a non-party, was the entity intended by Congress to bear the burden of the award.

The *Hutto* result was reasoned from the language of the Senate committee report relied on by the majority in this case. In addition, the *Hutto* majority discussed as a basis the distinction between one sued in his official capacity and in his individual capacity. From these, the Supreme Court determined that Congress intended a non-party State agency, or the State itself, to be liable for counsel fees incurred by errant officials.

Though the distinction between a person's official capacity and his individual capacity is not so obvious to me as it is to Mr. Justice Stevens, I acknowledge that this inferior court must apply the reasoning of *Hutto* in a proper case. But *Hutto* is not this case.

There, the State of Arkansas was held liable for attorneys' fees in a derivative manner: defendant State official Hutto was legally liable, ergo the State was legally liable. In this case legislative immunity prevents the award of attorneys' fees against the Supreme Court of Virginia. Applying the principle of *Hutto,* that the State is derivatively liable for the activities of its officers, leads me to conclude that the Commonwealth cannot be held liable for attorneys' fees when the defendant Supreme Court of Virginia cannot be held liable. *Hutto* stands for the proposition that *if* the Supreme Court of Virginia were liable, the Commonwealth, even though a non-party, would be liable. Accordingly, I believe that *Hutto* does not require or allow this Court to award attorneys' fees against the Commonwealth when this

Court does not have the power to award attorneys' fees against the Supreme Court of Virginia.

I have already discussed my view that an award of attorneys' fees against the State on account of purely legislative activity is utterly inconsistent with the concept of legislative immunity. Just as Congress did not intend to disturb legislative immunity in passing the Act, so it did not intend to permit awards of attorneys' fees against States on account of legislative activity. It is true that in *White* v. *Crowell,* 434 F.Supp. 1119 (W.D. Tenn. 1977), a case cited by the majority, the Court awarded attorneys' fees against the State of Tennessee for a purely legislative act; a change in the apportionment of State legislative districts. It is not clear from the opinion whether the State of Tennessee was a named party defendant. The only named defendant which can be found in the report of the case is the Secretary of State of Tennessee. *White* is entirely devoid of reasoning to support an award of attorneys' fees against a non-party for purely legislative activities, and I do not believe it is a very instructive case.

Nor do I believe that the Commonwealth of Virginia may properly be held liable for attorney's fees where the Court has already found that special circumstances make an award of fees against the Virginia State Bar unjust. I agree with the holding of the majority that in the absence of special circumstances the Virginia State Bar would be liable for attorneys' fees. It may very well be that the Commonwealth of Virginia would have to pay such fees if awarded, and I do not doubt that the Commonwealth would in fact pay such a fee if ordered to do so by this Court. However, I believe that the Commonwealth is entitled to the benefits of the proper behavior of its officers and agencies just as it is subject to liability for their unlawful behavior. As I have ex-

plained above, I do not believe that anything in either *Hutto* or in the legislative history of the Act, properly understood, is intended to subject States to awards of attorneys' fees unless some agency or official of the State is first held liable. Accordingly, as special circumstances render an award against the State Bar unjust, such an award against the State would not be proper.

In conclusion, I believe legislative immunity does not allow this Court to award attorneys' fees against the Supreme Court of Virginia. Special circumstances make such an award against the State Bar unjust. *Hutto* and the legislative history allow an award against a State only when some official or agency of the State is first held to be liable. No official or agency of the State can be held liable for counsel fees in this case. The Commonwealth, therefore, cannot be held liable.

VIII

Finally, I would hold that, even if the Court were empowered to award attorneys' fees against the Supreme Court of Virginia, special circumstances render such an award in this case unjust. There is not now nor has there ever been any appropriate suggestion that any of the defendants acted in bad faith in enacting the Rule or with regard to any aspect of this litigation. While it is scarcely necessary to emphasize here that a finding of bad faith is not necessary to an award of attorneys' fees, a party's good faith is nevertheless a factor which the Court may consider in determining whether an award of fees is appropriate.

Here, the majority frowns upon the Supreme Court for its failure to amend DR 2-102(A)(6) to conform with certain ABA and VSB proposals and for its failure to amend the rules since the decision in *Bates*. It is my view that this language in the majority's opinion represents a stark exam-

ple of the dangers inherent in any relaxation of the ancient rule of legislative immunity. The majority has taken it upon itself to criticize the Supreme Court of Virginia for its failure to conform to the majority's idea of the course a lawmaking body should follow. The majority appears to be applying a bad faith standard to the Virginia Supreme Court when it declares that it will order the Supreme Court to pay attorneys' fees because of "their continued failure and apparent refusal to amend State Code DR 2-102(A)(6) to conform with constitutional requirements." Majority op. at 12. This kind of inquiry by the courts into the legislative process is inimical to the separation of powers and the republican form of government and precisely the kind of behavior which absolute legislative immuniity is intended to avoid.

Despite the appearance of a bad faith standard, I do not believe that the majority intended to imply that the Supreme Court of Virginia is guilty of bad faith in this matter. The questions surrounding advertising by attorneys are grave questions of public policy. They are not simple and they are not cut and dried. When confronted with the constitutional challenge to these regulations, this Court responded with three separate opinions and the Supreme Court responded with four separate opinions. No one pretends that the Supreme Court's opinion in *Bates* answered all of the questions which exist with respect to the proper scope of State regulation. Under these circumstances, I do not believe that the failure of the Supreme Court of Virginia to act in 1976, or its failure to act since June 1977, in any way bears upon the justness of an award of fees against that Court.

In my view, such an award would be extremely unjust. The ban on professional advertising by lawyers is time honored. It was embodied in Canon 27 of the *Canon's of Professional Ethics of the American Bar Association* in 1908. This Canon remained essentially unchanged, though amended more often

than any other Canon. Its precept was carried over into the relatively recently enacted Code of Professional Responsibility. Challenges to the advertising ban, by contrast, are of very recent origin. I believe that the antiquity of the ban and the unsettled character of the new rules, even at present, are factors which weigh against the award of attorneys' fees in this case, just as they did in *Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976).

Furthermore, I believe that it is highly unseemly for this Court to award attorneys' fees against the Supreme Court of Virginia, a court of greater dignity. The idea of this Court issuing an order to the Supreme Court of Virginia ordering that Court to pay money to a litigant in this Court seems to me utterly inconsistent with the concepts of comity and federalism which are central to our form of government. I would not favor it except in those cases in which a citizen's rights under the federal Constitution could not otherwise be vindicated. I believe that such a case would be an extreme case, and I do not believe that we are faced with it at this juncture. Accordingly, even if the majority were correct in its view of the law applicable to this case, I would still dissent from an award of attorneys' fees against the Supreme Court of Virginia.

For these reasons, I respectfully dissent from the decision of the majority.

D. Dortch Warriner
United States District Judge

Date: 1 May 1979

APPENDIX 3

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that The Supreme Court of Virginia and the Honorable Lawrence W. I'Anson, individually, and in his official capacity as Chief Justice of the Supreme Court of Virginia, hereby appeal to the Supreme Court of the United States from those portions of the Order entered on May 8, 1979, awarding declaratory and injunctive relief and attorney's fees against these defendants.

This appeal is taken pursuant to Title 28, United States Code, Section 1253.

Dated: June 7, 1979.

The Supreme Court of Virginia,
et al., Defendants

By Marshall Coleman
Attorney General of Virginia

Supreme Court, U. S.
FILED
AUG 17 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
and
LAWRENCE W. I'ANSON,
in his personal and official capacity
as Chief Justice of The Supreme Court of Virginia,
Appellants,

v.

CONSUMERS UNION OF THE
UNITED STATES, INC., *et al.,*
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF AMICUS CURIAE OF THE STATE OF SOUTH CAROLINA JOINED BY THE ATTORNEYS GENERAL OF ARIZONA, DELAWARE, FLORIDA, ILLINOIS, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, RHODE ISLAND, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN AND WYOMING

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
and
LAWRENCE W. I'ANSON,
in his personal and official capacity
as Chief Justice of The Supreme Court of Virginia,
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v.

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Appellees.

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INTEREST OF THE AMICUS CURIAE

On May 8, 1979, a three-judge district court for the Eastern District of Virginia entered an order and memorandum opinion awarding declaratory and injunctive relief and

attorneys' fees against the Supreme Court of Virginia and its Chief Justice. The Court held that the doctrine of judicial immunity did not protect the defendants from the award of such relief.

The interest of the amicus, joined by the attorneys general of the above twenty-one states, is that the opinion of the Court will effect fundamental alteration in the relations between the state and federal courts. The amicus seeks a clear statement from this Court to guide the lower federal courts in entertaining suits against judges arising from the judicial function and a clear prohibition against monetary awards against state judges or the courts on which they sit, most especially in those instances in which the defendant judges and courts act in good faith of execution of their duties.

JURISDICTION

Jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

ISSUES PRESENTED

1. May judges be sued for actions taken within or in excess of their judicial jurisdiction?

2. If attorneys' fees may be awarded against a state court or its judges, may such an award be made in the absence of an express finding that the actions complained of were taken in bad faith?

STATEMENT OF THE CASE

The *amicus curiae* adopts the Statement of the Case in the Jurisdictional Statement.

SUMMARY OF ARGUMENT

Congress could not have intended to abolish judicial immunity under 42 U.S.C. § 1988 since suits against judges

(and *a fortiori* the Courts on which they sit) for their discretionary judicial actions are not suits which may be brought to enforce the provisions of the Civil Rights Acts. If, however, such suits may be brought, substantial policy interests dictate that an express finding of bad faith be made before an award of attorneys' fees may be made against a court or its judges.

ARGUMENT

I.
THE DOCTRINE OF JUDICIAL IMMUNITY PROHIBITS ALL SUITS AGAINST JUDGES FOR ACTIONS TAKEN WITHIN OR IN EXCESS OF THEIR JUDICIAL JURISDICTION.

Most recently in *Stump* v. *Sparkman,* 435 U.S. 349 (1978) and in *Pierson* v. *Ray,* 386 U.S. 547 (1967), this Court recognized that the common-law defense of judicial immunity applies with equal force to actions brought under the Civil Rights Acts. Both of these cases, and the earlier cases of *Randall* v. *Brigham,* 74 U.S. (7 Wall.) 523 (1869) and *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335 (1871) upon which this Court relied, applied the rule that judicial immunity protects judges against "civil actions" in the context of suits for damages. As a result, the question has been raised whether the doctrine protects judges against being required to defend in suits seeking equitable relief from actions taken by them in their judicial capacity. An examination of the doctrine compels the conclusion that such suits cannot be maintained.[1]

[1] The Court below correctly determined that the doctrine of judicial immunity was applicable to the acts of the defendants, it merely misconstrued the scope of the doctrine. While the enactment of rules governing the conduct of the bar may also be described as "legislative," as the dissent below argued, it is judicial in the sense that it is the exercise of exclusive judicial power to set rules for admission or disbarment.

At common law, judges cannot be sued for acts done or words spoken in their judicial capacity. *Floyd and Barker,* 12 Co. Rep. 23, 77 Eng. Rpt. 1305 (1607); *Yates* v. *Lansing,* 5 Johns. 282 (N.Y. Sup. Court of Judicature 1810); *Taaffe* v. *Downs,* (1813) reported in *Calder* v. *Halket,* 3 Noo. 38, 13 Eng. Rep. 12. (1839). This immunity was designed to protect judges from continuous litigation regarding decisions reached in a judicial capacity and was based on the theory that a judge was answerable only to his Sovereign for his judicial acts and not to any other judge. Therefore, a judge could not be questioned about his judicial acts by another judge, either at law (for damages) or in equity (for an injunction). *Heath* v. *Rydley,* Cro.Jac. 335, 79 Eng. Rep. 286 (1614). In either case, the proper remedy was by way of a writ of error from a superior court. As Maitland pointed out:

> Understand well that the Court of Chancery never asserted that it was superior to the Court of Law; it never presumed to send to them such mandates as the Court of King's Bench habitually sent to the inferior courts, telling them that they must do this or must not do that or quashing their proceedings—the Chancellor's injunction was in theory a very different thing from a mandamus, a prohibition, a certiorari, or the like. It was addressed not to the judge, but to the party.

Maitland, EQUITY: A COURSE OF LECTURES, at 9 (1936).

In this country, the common-law doctrine of judicial immunity was first enunciated by Mr. Chief Justice Kent for the New York Supreme Court in the case of *Yates* v. *Lansing, supra.* This court, citing *Yates,* adopted and elaborated on the doctrine in *Randall* and *Bradley.* Each of these cases, and the subsequent cases which have reaffirmed the immunity, refers to the immunity as one from all "civil actions." In addition to the English common-law precedents holding

that judges were immune from suits in equity, *Heath* v. *Rydley, supra,* it is instructive to note that Mr. Justice Miller, a member of the majority of this Court in both *Randall* and *Bradley,* speaking on Circuit near the time of those decisions, stated:

> The phrase 'civil actions' includes actions at law, *suits in chancery,* proceedings in admiralty, and all other judicial controversies where rights of property are involved, whether between private parties, or such parties and the government. It is used here in contradistinction to prosecutions for crime.

United States v. *Ten Thousand Cigars,* 1 Woolw. 123, 28 Fed. Cas. 39 (1867). (emphasis added) *Accord, Green* v. *United States,* 76 U.S. (9 Wall.) 655 (1869); *Rison* v. *Cribbs,* 1 Dill. 181, 20 Fed. Cas. 833 (1870). This Court, then, apparently intended itself to be understood to bar equitable as well as legal actions against judges when they act in their judicial capacity.

That equitable suits as well as suits for damages cannot be brought against a judge is clear when one of the principal purposes of the doctrine is recognized. While relieving members of a court of the dangers of vexatious and harrassing litigation and removing the fear of monetary liability for the actions which they undertake in a judicial capacity are compelling reasons for imposing the doctrine, and reasons often cited in the cases on the subject, a primary, and perhaps overriding purpose is to protect the jurisdiction of the courts and the finality of judgments.

If the law permits a judge to be enjoined from taking actions which lie in his powers as a judge he may be enjoined from applying the law in a particular fashion in a case before him, *See, e.g. Wilkins* v. *Rogers,* 581 F.2d 399 (4th Cir. 1978), or from enforcing his orders in a particular case. It is

the act of judgment as much as the judge which the doctrine is designed to protect.

One of the earliest reported cases noted this concern:

> . . . for if the judicial matters of record should be drawn in question, by partial and sinister supposals and averments of offenders, or any on their behalf, there never will be an end of causes: but controversies will be infinite. . .

Floyd and Barker (1608), *supra.* Likewise, Chief Justice Kent stated in the first American case on judicial immunity:

> Judicial exercise of power is imposed upon the courts. They must decide and act according to their judgment, and therefore the law will protect them. The chancellor, in the case of the plaintiff, was bound in duty to imprison and reimprison him, if he considered his conduct, as amounting to a contempt of his court. The obligations of his office left him no volition. He was as much bound to punish a contempt commited in his court, as he was bound in any other case to exercise his power. He may possibly have erred in judgment, in calling an act a contempt which did not amount to one, and in regarding a discharge as null, when it was binding. This court may have erred in the same way; still his was but error of judgment, for which neither the chancellor, nor the judges of this court, are or can be responsible in a civil suit. Such responsibility would be an anomaly in jurisprudence. No statute could have intended such atrocious oppression and injustice. . .

Yates v. *Lansing,* 5 Johns. at 297, 398 (1810). Appellate courts exist to correct the errors of judges. To permit injunctive relief against the judicial acts of a judge would provide a means of collaterally attacking judgments irreparably damage the orderly administration of justice.

A rule which would permit injunctions but not damages

to be awarded against judges would undercut the underlying reasons for the immunity and produce the incongruous result that all judges could be harrassed and intimidated but that judges who acted with malice or corruption would be protected against payment of damages. A rule whose sole effect is to protect the purses of the guilty is pointless. As this Court has previously stated:

> [judicial immunity] *is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their independence, and without fear of consequences.*

Bradley, supra, at 350 (citations omitted) (emphasis in original).

An additional consideration is presented where the injunctive relief is sought in a Federal court against a State judge. The doctrine of judicial immunity so far discussed applies equally to State and federal judges. *See, e.g., Smallwood* v. *United States,* 358 F.Supp. 398 (E.D. Mo. 1973), *aff'd.* 486 F.2d 1407 (8th Cir. 1973). If the common law does not protect a judge from suits for injunctions one Federal judge may, of course, enjoin another. In the context of federalism, the friction between State and federal courts, a constant source of concern in the past, would be exacerbated by permitting such suits to be entertained. The incidence of suits against State judges in federal court alleging denial of due process of law in the manner or substance of the State court's rulings or alleging the unconstitutionality of the law applied and seeking injunctive relief against the judge will increase and presumably the defendant State judge will be required to appear in federal district court to explain his rulings or judicial conduct, thus placing the District Courts in a quasi-appellate role over the State courts. A funda-

mental change in the roles of the State and federal courts would be effected.

Congress cannot have intended such a far-reaching result nor can such an intention be lightly presumed from the general language of the Civil Rights Acts.

Since the Civil Rights Acts, under which this case was brought were not designed to permit the District Courts to entertain civil actions against State judges or the Courts upon which they sit for the exercise of their judicial power, such a suit is not "an action or proceeding to enforce the provisions" of the Civil Rights Acts and the award of attorneys' fees for such a suit is not within the contemplation of 42 U.S.C. § 1988.

II.
IN LIGHT OF THE HIGHLY SENSITIVE CONSTITUTIONAL ISSUES INVOLVED IN THE RELATIONS BETWEEN THE STATE AND FEDERAL COURTS, AWARDS OF ATTORNEYS' FEES AGAINST A STATE COURT, IF AUTHORIZED, SHOULD ONLY BE AWARDED UPON AN EXPRESS SHOWING OF BAD FAITH.

This Court and the lower Federal Courts have in the past limited the award of attorneys' fees to instances in which it is found that the case of the party against whom the fee was awarded was frivolous, unreasonable, or without foundation, *Christianburg Garment* v. *EEOC,* 434 U.S. 412 (1978), in order to protect substantial policy interests. The purpose of permitting an award of attorneys' fees is to effectuate the policies of the substantive provisions of the law to which it applies. As has been demonstrated, the substantive provisions of the Civil Rights Acts were not and could not have been intended to permit suits against the State courts. Congress did not enact the Civil Rights Acts to permit suits to harrass and intimidate the State judiciary. *Pierson* v. *Ray,* 386 U.S.

547 (1967). The State courts, as this Court has repeatedly noted, are also vested with the responsibility of protecting Federal rights and when they act in a judicial capacity, either by deciding cases or fashioning rules governing the membership in the bar, it cannot be assumed that they did so without regard to the Constitutional implications of their decisions. Opinions regarding the Constitutionality of any particular action may differ radically. Prior to the decision of this Court in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), the majority of the States prohibited advertising by attorneys. It must be assumed that those Courts which had enacted the rule did so in the honest belief that the Constitution did not prohibit such a rule. The State courts were incorrect in this decision as they might on occasion be in other decisions made by them. The existence of appellate courts assumes that such errors will be made. However, the fact that the State courts, like the federal courts, provide a device for the resolution of controversies and a mechanism by appeal to this Court by which such errors may be cured, militates against the argument that resort to the District Courts and awards of attorneys' fees are necessary in order to vindicate the policies embodied in the Civil Rights Acts. It is, after all, judges who must decide Constitutional questions and the errors of decisions made in good faith should not form the basis for the award of attorneys' fees. Congress cannot have intended that those charged with protecting the Constitution arrive at the correct decision at their peril. The Federal District Courts and Courts of Appeal, charged with the protection of the Constitution have arrived at erroneous conclusions of law. Indeed, this Court has on occasion reconsidered previous decisions and arrived at a different conclusion. Decisions by the members of the State courts concerning the Constitutional issues with which they are daily presented could not have been intended by Congress to be corrected in the Fed-

eral District Courts and attorneys' fees awarded for correction of good faith errors.

The policy of encouraging fearless decision-making by the State courts which underlies judicial and legislative immunities can only be hindered by permitting routine awards of attorneys' fees when those decisions prove to be incorrect.

CONCLUSION

The judgment of the District Court should be reversed insofar as it applies to the Supreme Court of Virginia and the Chief Justice. The award of attorneys' fees against the Supreme Court of Virginia and the Chief Justice should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 17 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

O.T. 1979

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SUPREME COURT OF VIRGINIA, *et al.*,
Appellants,

vs.

CONSUMERS UNION OF THE UNITED STATES, INC., *et al.*,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF AMICUS CURIAE ON BEHALF OF THE CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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In The

Supreme Court of the United States

O.T. 1979

No. 79-198

SUPREME COURT OF VIRGINIA, *et al.*,
Appellants,

vs.

CONSUMERS UNION OF THE UNITED STATES, INC., *et al.*,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF AMICUS CURIAE ON BEHALF OF THE CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF THE JURISDICTIONAL STATEMENT

OPINIONS BELOW

The majority and minority opinions of the three-judge court for the Eastern District of Virginia from which this appeal is taken are not yet reported. They are reproduced at Appendix 2 to Appellants' Jurisdictional Statement. An earlier opinion in this case is reported *sub. nom. Consumers Union* v. *American Bar Association,* 427 F.Supp. 506 (E.D. Va. 1976), *vacated and remanded,* 433 U.S. 917 (1977).

JURISDICTION

The jurisdiction of this Court attached under 28 U.S.C. § 1253. The three-judge court below was invoked prior to the repeal of 28 U.S.C. § 2281. See 28 U.S.C. § 2284 note. The judgment of the three-judge court from which the appeal is taken was entered on 8 May 1979. Notice of appeal was timely filed on 7 June 1979.

INTEREST OF THE AMICUS CURIAE

The Conference of Chief Justices came into existence twenty years ago under the aegis of the Section of Judicial Administration of the American Bar Association. Its membership is made up of the presiding judicial officer of the highest court of each of the States of the Union. Its concern is with the administration and improvement of the court systems over which each of its members presides and with the relation of these systems to the federal judiciary. This case, in which this Court is called upon to delineate important features of the long-standing doctrine of judicial immunity, touches on matters of great urgency and importance to each of the members of the Conference and to the Conference as a medium through which its membership seeks to improve the effectuation of the judicial business of the States. The judgment in this case will affect directly the capacities of every judge in the Nation—State and federal—to perform his or her judicial duties.

LETTERS OF CONSENT

Counsel for the Appellants and the Appellees have granted consent to the amicus curiae here to file this brief in support of the Appellants' jurisdictional statement. The letters of consent have been filed in the Office of the Clerk of this Court.

STATUTE AND RULE INVOLVED

42 U.S.C. § 1988 reads in relevant part;

> In any action to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this Title, Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs. [Act of Oct. 19, 1976.]

Virginia Code of Professional Responsibility, DR 2-102, reads in relevant part:

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in a dignified form: . . . (6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or firm specializes in a particular field of law or law practice but only if

authorized under DR 2-105(A)(4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; foreign language ability; names and addresses of references, and, with their consent, names of clients

QUESTIONS PRESENTED

1. May a federal court impose attorneys' fees on a state court or its Justices when the state court and its Justices were neither necessary nor proper parties to the lawsuit?
2. Do the Virginia Supreme Court and its Justices enjoy absolute immunity from suit for actions taken within the perimeters of their judicial duties?
3. Could Congress and did Congress provide for infringement of judicial immunity in its amendment of 42 U.S.C. § 1988?
4. Does the immunity of the Supreme Court of Virginia and its Justices fail because the promulgation of court rules is a legislative and not a judicial function?

STATEMENT

This action was commenced by the Consumers Union of the United States and the Virginia Citizens Consumers Council (Appellees), two private, not-for-profit organizations, against the American Bar Association, the Virginia State Bar, its president and the chairman of its Legal Ethics Committee, the Supreme Court of Virginia and its Chief Justice (the last two are the Appellants). The complaint sought a declaratory judgment that Appellees had been de-

prived of their constitutional rights to secure data from Virginia lawyers for publication in a directory because the provisions of the Virginia Code of Responsibility limited information that a Virginia lawyer could make available for such a directory, and particularly facts about his fees and charges. The complaint also sought an injunction against enforcement of the Code, not against Appellees who were not subject to the Code but against Virginia lawyers not parties to the action, the only ones subject to the terms of the Code. No member of the Virginia Bar was a party plaintiff.

The Virginia State Bar is an integrated bar and is the organ charged with administration and enforcement of the Virginia Code of Professional Responsibility through its Legal Ethics Committee. It initiates complaints, conducts investigations, holds hearings, and determines whether to seek judicial sanctions against recalcitrant members of the Bar by way of adversary judicial proceedings.

The Virginia Supreme Court promulgated the challenged Rule pursuant to the authority vested in it by § 54-48 of the Virginia Code. Neither the Virginia Supreme Court nor any of its Justices has any responsibility for enforcement of the Rule except in the course of judging cases that come before it as the result of adversary proceedings instituted by the Virginia State Bar, or by way of petitions to it in its judicial capacity.

In December, 1976, the three-judge United States District Court for the Eastern District of Virginia handed down its decision in favor of Appellees, granting the declaratory judgment and injunction sought. 427 F. Supp. 506 (1976). The district court was divided. Judge Merhige wrote the "majority" opinion, essentially finding the case governed by this Court's then recent opinion in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 425

U.S. 748 (1976), and holding that no distinction could be drawn between publication of pharmacists' price lists and lawyers' "price lists." Judge Warriner could not "concur with that portion of the [Merhige] opinion which permits advertising for any service other than for an initial consultation of a specified length of time." *Id.* at 531. Judge Albert Bryan dissented on the ground that suit could not lie against the Supreme Court of Virginia in the federal district court on the premises of this case.

The district court judgment was appealed to this Court and held for disposition pending this Court's determination of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). That case, of course, involved no question of the propriety of suit against a State's high court. The Supreme Court of Arizona was not a party to the proceedings, except that it was the court whose judgment was being reviewed in the ordinary course.

The holding in *Bates,* by a sharply divided Court, was not expansive. As the Court said in its conclusion, 433 U.S. at 384:

> The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

This Court obviously did not regard its disposition of *Bates* as dispositive of the issues in this case. The Court did not affirm the trial court's judgment then here on appeal. Instead, it vacated the judgment and remanded the case for reconsideration. 433 U.S. 917 (1977).

On remand, the defendants stipulated that there was no objection to the publication of the Appellees' directory with the fee information. The trial court proceeded to hold hearings on the question of attorneys' fees. It then rendered its opinion and the judgment from which this appeal is taken. Finding the case to be one brought under 42 U.S.C. § 1983, the district court found authority for imposing attorneys' fees on the Appellants in the recently enacted amendment to 42 U.S.C. § 1988.

The trial court seemed to believe that it could find justification for the imposition of these not insubstantial fees—Appellees claim an amount in excess of $121,000 as attorneys' fees—on the Supreme Court and its Chief Justice, on the newly announced ground that the Supreme Court of Virginia had failed to enact a new Rule to govern lawyer's advertising. This failure by the Virginia Supreme Court to promulgate a new court rule was to be penalized by the imposition of attorneys' fees. The issue of a new rule was, of course, not one raised by the pleadings or addressed by the evidence. This attempt to become the overseer of the State high court's operations was simply another act of supererogation on the part of the federal district court.

The case on appeal thus presents many substantial questions about the legitimacy of federal court oversight of state judicial operations other than by way of judicial review, and not least with regard to the proper measure of judicial immunity. The questions raised are important ones not heretofore directly resolved by judgments of this Court. In light of the holdings of this Court in *Davis* v. *Passman,* ..... U.S. ....., 99 S.Ct. 2264 (1979), and *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971), that causes of action may arise directly under the Constitution, without the need for statutory provisions like 42 U.S.C. § 1983, the issues raised here are as relevant to federal judicial immunity as to state ju-

dicial immunity. See *Butz v. Economou,* 438 U.S. 478 (1978).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

May A Federal Court Impose Attorneys' Fees On A State Court Or Its Justices When The State Court And Its Justices Were Neither Necessary Nor Even Proper To The Lawsuit?

Antecedent to the fundamental questions about judicial immunity is the question whether, on the facts of this case, the Supreme Court of Virginia and its Chief Justice could properly be charged with attorneys' fees. The complaint sought (1) a declaration of the constitutional invalidity of DR 2-102 and (2) an injunction to prevent its enforcement against Virginia lawyers who would supply the data sought by Appellees for publication in their "directory." The district court order (Appellants' Jurisdictional Statement, App. 1) held the Rule "unconstitutional on its face" and enjoined its enforcement. The Supreme Court and its Chief Justice were neither proper nor necessary parties to the relief sought or the relief granted. The Appellants were the promulgators of the challenged rule and not its administrators. A declaration of the Rule's invalidity or an injunction against its enforcement would not invoke or require any action or inaction on the part of the Virginia Supreme Court or its Justices.

As Judge Friendly pointed out in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* 299 F. Supp. 117, 124 (S.D.N.Y. 1969), *aff'd,* 401 U.S. 154 (1971): "While plaintiffs' attack on the 'statutory scheme' governing admission to the bar takes in a Rule of the [N.Y.] Court of Appeals, Rule VIII, the involvement of that rule does not necessitate joinder of its authors any more than an attack on the application of a statute requires joinder of the legislature. . . . There is no practical obstacle to adjudication of the constitutionality of this procedure in the absence of the Court or its members."

There, as here, the administration of the Rule in question lay elsewhere than in the high state court. There the enforcers of the Rule were the members of the Appellate Division. Here the enforcement of the Rule is vested in the State Bar. Full and complete relief could be afforded in both cases without invoking the State's high court or its judges as parties defendant. None of the relief sought or granted called for action by the Supreme Court of Virginia or its Justices. Since the Appellants were neither necessary nor proper parties to the litigation, it would seem clear that they should not be charged with costs, no less attorneys' fees, simply because the Appellees were successful in securing the relief they sought. Just as the legislature is not an appropriate defendant in a suit to declare unconstitutional any statute enacted by it; just as the President is not an appropriate party defendant in a suit to declare unconstitutional and enjoin the enforcement of an Executive Order, see, *e.g., Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); just as this Court is not an appropriate party defendant in a suit contesting the validity of a Federal Rule of Civil Procedure promulgated by it, see, *e.g., Hanna* v. *Plumer,* 380 U.S. 460 (1965); *Gold Metal Process Co.* v. *United Engineering & Foundry Co.,* 351 U.S. 445 (1956); *Sears Roebuck & Co.* v. *Mackay,* 351 U.S. 427 (1956); *Mississippi Pub. Corp.* v. *Murphree,* 326 U.S. 438 (1946); *Sibbach* v. *Wilson & Co., Inc.* 312 U.S. 1 (1941), so, too, the judicial promulgator of a judicial Rule in Virginia is an inappropriate defendant in a suit to have the Rule declared unconstitutional and its enforcement enjoined.

II.

Do The Virginia Supreme Court And Its Justices Enjoy Absolute Immunity From Suit For Actions Taken Within The Perimeters Of Their Judicial Duties?

This Court, in *Butz* v. *Economou,* 438 U.S. 478 (1978), reiterated the longstanding doctrine that judges in the performance of their official functions enjoyed absolute immunity from suit, although executive officials may have only a qualified immunity. Neither the majority opinion in *Butz, id.* at 511-12, nor the minority opinion, *id.* at 528 n.*, had expressed any doubts that judicial officers or those engaged in the judicial function were entitled to absolute immunity.

Absolute immunity can mean only immunity from being sued, not merely from sanctions in the event that a suit were to prove successful. In an expression of the rule of absolute immunity for judicial officials, Judge Learned Hand, in *Gregoire* v. *Biddle,* 177 F.2d 579, 581 (2d Cir. 1948), expressed its rationale in words often quoted by this Court and others:

> The justification for [absolute judicial immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the

> answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

This Court in *Stump* v. *Sparkman,* 435 U.S. 349 (1978), recently reiterated the validity of the doctrine of absolute judicial immunity in a case where the facts pushed the doctrine to its limits. In doing so, the Court announced, *id.* at 355-56:

> The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley* v. *Fisher,* [13 Wall. 335 (1872)], at 347. For that reason the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle. *Pierson* v. *Ray,* 386 U.S. 547 (1967).

The suit in issue here was nevertheless allowed to be brought under 42 U.S.C. § 1983 against judicial officials. It must be conceded that, despite the plain rule established by this Court that judicial immunity is applicable to § 1983 cases, some lower federal courts since the late 1960's have

condoned equity suits against judges under § 1983, as distinguished from suits for damages. See, *e.g., Person* v. *Ass'n of Bar of City of New York,* 554 F.2d 534, 537 (2d Cir. 1977), *cert. den.,* 434 U.S. 924 (1977); *Littleton* v. *Berbling,* 468 F.2d 389, 406-07 (7th Cir. 1972), *rev'd on other grounds, O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Law Students Civil Rights Research Council* v. *Wadmond,* 299 F. Supp. 117, 123 (S.D.N.Y. 1969), *aff'd on other grounds,* 401 U.S. 154 (1971); *United States* v. *McLeod,* 385 F.2d 734, 738 (5th Cir. 1967). Prior to *McLeod,* and sometimes since, the rule of judicial immunity has been held to encompass all suits under § 1983, whether equity actions or damage claims. See, *e.g., Adkins* v. *Underwood,* 370 F. Supp. 510 (N.D.Ill. 1974), *aff'd,* 520 F.2d 890 (7th Cir. 1975), *cert. den.,* 423 U.S. 1017 (1975); *Cheramie* v. *Tucker,* 493 F.2d 586 (5th Cir. 1974); *Mackay* v. *Nesbett,* 285 F. Supp. 498, (D. Alaska 1968), *aff'd,* 412 F.2d 846 (9th Cir. 1969), *cert. den.,* 396 U.S. 960, (1969); *Gay* v. *Heller,* 252 F.2d 313 (5th Cir. 1958); *Brown* v. *Dunne,* 409 F.2d 341 (7th Cir. 1969); *Peckham* v. *Scanlon,* 241 F.2d 761 (7th Cir. 1957); *Tate* v. *Arnold,* 223 F.2d 782 (8th Cir. 1955); *Mirin* v. *Justices of the Supreme Court of Nevada,* 415 F. Supp. 1178, 1192 (D.Nev. 1976).

This Court has not approved any such change. And, with all respect, the lower courts have afforded no basis for distinguishing the two kinds of actions within the rationales for the rule of judicial immunity announced by this Court. To say that judges may not be harassed by actions for damages, but may be harassed by actions for injunctions is a gross and unwarranted infringement of the recognized doctrine. Nor is the argument that in the absence of such a cause of action against judges some plaintiffs would be denied protection of their civil rights a cogent one. First, that is the same argument that has been made and rejected with regard to dam-

age actions. Second, it is factually unsound. In none of the cases, and certainly not this one, see point I *supra,* would plaintiffs be without remedy for a constitutional wrong if they were not free to bring suit against judicial officers for actions taken in the course of their duties.

The result of the new rule of the lower Federal Courts is that judges' pocketbooks are to be protected, but their judicial functions are to be subject to interference. In any event, the issue is one of sufficient importance to warrant this Court's clarification of the governing rule, especially in the light of conflicting decisions in the lower courts.

III.

Could Congress And Did Congress Provide For Infringement Of Judicial Immunity In Its Amendment Of 42 U.S.C. § 1988?

Event if the lower federal courts were right in holding that equity actions against judges under § 1983 are free from the defense of judicial immunity, it is clear that imposing monetary sanctions on judges for defending their judicial behavior would fall afoul the concept of judicial immunity as a protector of the judges' purses if not their independence. The court below, however, determined that the amendment to § 1988 was a legislatively authorized invasion of this judicial immunity.

The exact issue in this case is whether a district court of the United States can, consistently with the law of judicial immunity, levy an assessment on the Supreme Court of Virginia and its Chief Justice approximating $121,000. There can be no doubt from reading the opinion of the court below that the "fees" were assessed as punishment on the Virginia Supreme Court, and essentially as punishment for failing to amend a Supreme Court Rule to the liking of the federal district judge. There was, of course, no need to amend the

Rule to afford the plaintiffs relief. The declaration of unconstitutionality and injunction against enforcement gave plaintiffs all that they could or did demand. So far as the doctrine of judicial immunity is concerned, it should matter little whether the judicial defendants are mulcted in the name of damages or in the name of attorneys fees: the danger to judicial independence is the same.

The court below however, assumed that the amendment to § 1988, because it was not qualified in its terms and because there was a reference in the House of Representatives report to damage cases against public officials affording a basis for counsel fees, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976), that judicial immunity was equally impaired. Of course, the House Report could not have referred to suits for damages against judicial officers because such suits have been precluded by the doctrine of judicial immunity at least since 1872. Equally important, the fact is that it was not the House Bill but the different Senate version that became law. And the Senate Report makes quite clear that no such major revision as an impairment of judicial immunity was contemplated. "The bill created no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which has been going on for years prior to the Court's May decision [in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975)]" S. Rep. No. 94-1011, 94th Cong., 2d Sess. 7 (1976).

There is no suggestion in the legislative history any more than in the language of the law that Congress intended to affect the scope of judicial immunity. And so, as this Court reasoned in *Pierson* v. *Ray,* 386 U.S. 547, 554-55 (1967):

> We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney* v. *Brandhove,* 341 U.S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

As the Court said in *Pierson*: "Since our decision in *Tenney* v. *Brandhove, supra,* the courts of appeals have consistently held that judicial immunity is a defense to an action under § 1983." 386 U.S. at 555 n.9. And this has remained so, with the exceptions noted above, to this day. Congress must have been cognizant of the existence of the doctrine and it is reasonable to "presume that Congress would have specifically so provided [in § 1988] had it wished to abolish the doctrine."

There is an additional reason to construe the statute as not having amended the immunity of judges against imposition by litigants who sue them because of the performance of their judicial duties. To read the statute otherwise than as preserving judicial immunity would raise serious questions about its constitutionality. The absolute immunity of judges derives from the same source as the qualified immunity of Presidents to maintain the confidentiality of their papers. See *United States* v. *Nixon,* 418 U.S. 683, 705-07 (1974). The constitutional doctrine of separation of powers would seem to preclude legislative incursion on the independence of the judiciary by this means. Moreover, as the Court of Appeals for the Third Circuit, sitting *en banc,* in *Bauers* v. *Heisel,* 361 F.2d 581, 588-89 (3d Cir. 1966), wrote:

Article 4, § 4 of the United States Constitution provides: "The United States shall guarantee to every State in this Union a Republican Form of Government***." The framers of the Constitution clearly evidenced their belief that a separate and independent judiciary is an indispensable element of a republican form of government. See The Federalist, pp. 236, 303-305, 488 et seq., 494 et seq. We believe that abrogation of judicial immunity by Congress would destroy the independence of the judiciary in the various States, and consequently deprive them of a republican form of government. The language of the Supreme Court in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 20 L. Ed. 646, lends support to our conclusion.

"***[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and *would destroy that independence without which no judiciary can be either respectable or useful.*" (Emphasis added.)

Thus, a construction of the statute wholly in keeping with its language and legislative history that judicial immunity was not to be infringed by the imposition of attorneys' fees on judges would avoid the necessity for reaching the constitutional questions.

IV.

Does The Immunity Of The Supreme Court Of Virginia And Its Justices Fail Because The Promulgation Of Court Rules Is A Legislative And Not A Judicial Function?

If it is suggested, as Judge Warriner did in the court below, that the rulemaking function of the Supreme Court of Virginia is a legislative and not a judicial function, it is apparent that the same consequences should flow from absolute legislative immunity as would from the absolute judicial immunity. *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); *Butz* v. *Economou,* 438 U.S. 478, 508-14 (1978). The argument in support of this position is cogently made by Judge Warriner in his dissent below and need not be reiterated here.

CONCLUSION

This case presents questions of fundamental importance to the maintenance of the independence of the judicial branch of government. This Court should note probable jurisdiction and determine these issues.

Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, certifies that three copies of the Brief *Amicus Curiae* of the Conference of Chief Justices have been served on counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 17th day of August, 1979, as follows:

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Supreme Court, U. S.
FILED
NOV 29 1979
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-198

SUPREME COURT OF VIRGINIA, ET AL.,

Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

JURISDICTIONAL STATEMENT FILED AUGUST 6, 1979
PROBABLE JURISDICTION NOTED OCTOBER 15, 1979

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APPENDIX

OPINION AND ORDER OF THE DISTRICT COURT

Opinion and Order of the District Court entered May 8, 1979, is reported as *Consumers Union of the United States* v. *Virginia State Bar,* 470 F.Supp. 1055 (E.D. Va. 1979), and is also reproduced in the Appendix to the Jurisdictional Statement.

DOCKET ENTRIES

February 27, 1975—Complaint filed. Summonses issued. Application for convening of Three-Judge Court, filed, with supporting memorandum.

March 21, 1975—Order extending the time for filing responsive pleadings by defts. upto April 3, 1975. Ent. March 21, 1975, filed, RRM., copies mailed.

March 25, 1975—Order substituting Honorable Lawrence W. I'Anson for Honorable Harold F. Snead, filed. Ent. March 25, 1975 RRM. Copies mailed.

March 25, 1975—Notification and request for designation to three judge court, filed.

March 26, 1975—Marshals return on summons as to all defendants listed executed and filed.

April 3, 1975—Deft's. #2., #3., #4., #5., #6. answer to complaint, no jury demanded, filed.

April 3, 1975—Deft. ABA's answer to complaint, no jury demanded, filed.

April 3, 1975—Pltf's. motion for summary judgment with supporting memorandum of points & authorities, filed.

April 3, 1975—Affidavit of Monroe H. Freedman, filed.

April 3, 1975—Affidavit of Marsha N. Cohen, filed.

April 3, 1975—Affidavit of Joel D. Joseph, filed.

April 3, 1975—Affidavit of James G. Frierson, filed.

April 3, 1975—Affidavit of Sandra Dement, filed.

April 7, 1975—Order soliciting response to pltf's. motion for summary judgment. Deft. may reply within Fifteen (15) days of this date. Pltf. may, within Five (5) days thereafter, submit any matters in rebuttal. Ent April 7, 1975, filed, RRM., copies mailed.

April 11, 1975—Motion to stay proceedings with respect to pltf's. motion for summary judgment, filed.

April 11, 1975—Motion to abstain, filed by defts.

April 18, 1975—Designation of Three-Judge panel of: Ho. Robert R. Merhige, Jr., John D. Butzner, Jr., & D. Dortch Warriner, by Chief Judge Clement F. Haynesworth, filed. Copies mailed counsel of record.

April 21, 1975—Order setting briefing schedule re: mot to abstain ent April 21, 1975, RRM, Jr., filed.

April 21, 1975—Order allowing parties 15 days to file authorities; ent April 21, 1975, RRM, Jr., filed. Copies to counsel. Copies to Judges.

April 21, 1975—Pre-trial order setting cut-off dates; exhibits to be filed by September 2, 1975; pltfs-opening brief due August 15, 1975; defts' September 15, 1975; pltfs' reply September 22, 1975; hearing September 25, 1975, 10 am ent April 21, 1975, RRM, Jr., filed. Copies to counsel & judges.

April 28, 1975—Memorandum in support of deft's. motion for abstention, filed.

May 5, 1975—Memorandum in Opposition to Defts' Motion for Abstention filed by pltfs. Copies delivered to Judges by counsel for pltfs.

May 13, 1975—Defts #2-6 Reply Memorandum in Support of Defts' Motion to Abstain, filed.

May 15, 1975—Pltfs' motion for leave to file supplemental memorandum, filed.

May 15, 1975—Pltfs' Supplemental Memorandum in opposition to defts' motion to abstain, filed.

June 3, 1975—Deft #1's notice to take disposition of Edward L. Wright on June 16, 1975, filed.

June 3, 1975—Deft #1's notice to take deposition of Walter P. Armstrong, Jr., filed.

June 3, 1975—Deft #1's notice to take deposition of John Eckler on June 17, 1975, filed.

June 3, 1975—Deft #1's notice to take deposition of C. Russell Twist on June 23, 1975, filed.

June 3, 1975—Deft #1's notice to take deposition of Monroe H. Freedman on June 30, 1975, filed.

June 13, 1975—In open court: Merhige, J. Halasz, OCR Appearances: Parties by counsel. Matter heard as to the awarding of travel expenses to pltfs' counsel for the taking of depositions in Tennessee. Matter taken under advisement by the Court. (10 Mins)

June 16, 1975—Defts' notice to take deposition of N. Samuel Clifton on June 24, 1975, filed.

June 16, 1975—Request for admissions as to defts. #2-6, filed by pltfs.

June 16, 1975—Request for admissions as to ABA, filed by pltfs.

June 19, 1975—Notice to take deposition of Monroe Freedman, filed by pltf.

June 30, 1975—Notice to take deposition of Wesley J. Liebler, filed by pltf.

July 2, 1975—Response to requests for admissions, filed by defts.

July 2, 1975—Answers to requests for admissions, filed by ABA.

July 8, 1975—Order amending designation of three-judge court; vacating designation of Judge Butzner & designating Hon. Albert V. Bryan, Sr.; ent July 2, 1975, CFH, Jr., filed. Copies mailed counsel of record.

July 10, 1975—Motion for an order directing answers within five (5) days under F.R.C.P. Rule 36(a) and for expedited consideration of this motion, filed by pltfs.

July 11, 1975—Deposition of Walter P. Armstrong, Jr., received.

July 11, 1975—Deposition of Edward L. Wright taken on behalf of defts., received.

July 11, 1975—Pltf.'s request for admissions, filed (second request).

July 11, 1975—Pltf.'s second request for admissions as to deft. ABA, filed.

July 14, 1975—Deposition of John Eckler Rec'd.

July 14, 1975—Pltf's. third request for admissions as to deft. ABA, filed.

July 14, 1975—Pltf's. third request for admissions as to defts. #2-6, filed.

July 15, 1975—Answers to second request for admissions, filed by ABA, copies mailed.

July 15, 1975—Order directing that the answer to pltf's. second request for admissions propounded upon defts be completed and served upon pltfs within five days of the date of this order. Ent. July 15, 1975, filed, DDW, copies mailed.

July 18, 1975—Pltf's Motion & Memorandum to Determine Sufficiency of Deft's Request for Admiss.

July 22, 1975—Response to second request for admissions, filed.

July 24, 1975—Motion to Determine the Sufficiency of Deft. VA State Bar's Answer to Request for Admissions Under F.R.Civ.P. Rule 36(a), and for Expedited Consideration of this Motion, filed by Pltf., filed.

July 24, 1975—Memorandum of Points & Authorities in Support of Motion to Determine the Sufficiency of Deft. VA State Bar's Answers to Request for Admissions and for Expedited Consideration of this Motion, filed by Pltf., filed.

July 25, 1975—Ordered that certain statements submitted to Deft. for admission in Pltfs' Second Request for Admissions be deemed admitted or that Deft. provide amended answers to said Second Request for Admissions, the Court is of the opinion that a decision on Pltfs' Motion should be deferred until further Order of Court, provided Pltfs' Second Request for Admissions will not be

subjected to August 15, 1975 deadline for completion of discovery, further that time fixed for filing of briefs is not modified, filed. Copies mailed.

July 29, 1975—Deposition of Wesley J. Liebeler, rec'd. Pages 1 thru 161. Taken on behalf of Pltf.

July 29, 1975—Deposition of Morton H. Freedman taken on behalf of the Pltfs. pages 1 thru 108, rec'd.

July 30, 1975—Response on Behalf of American Bar Association to Third Request for Admissions, filed.

July 30, 1975—Response on Behalf of American Bar Association to Pltfs' Motion to Determine Sufficiency, filed.

July 31, 1975—Order admitting certain of statements submitted to deft. Va. State Bar; deferring decision on pltf's motion until further order; pltfs' 2nd Request for Admissions not subjected to August 15, 1975 deadline; briefing schedule not modified; ent July 31, 1975, AVB, Sr. for The Court, filed. Copies to counsel & Judges.

August 5, 1975—Deposition of N. Samuel Clifton taken on behalf of Deft pursuant to Notice and Agreement of Counsel, received.

August 5, 1975—Deposition of C. Russell Twist taken on behalf of Deft pursuant to Notice and Agreement of Counsel, received.

August 6, 1975—Response on behalf of Virginia State Bar, et al., Pltfs' motion to determine sufficiency, filed.

August 6, 1975—Response of Virginia State Bar, et al., third request for admissions, filed.

August 13, 1975—Pltfs and Defts stipulate facts, filed.

August 14, 1975—Reply to Defts' Responses to Pltfs' Motion to Determine Sufficiency, filed.

August 14, 1975—Motion to Determine the Sufficiency of Defts' Answers to Pltfs' Third Request for Admissions and for Consolidation and Expedited Consideration of this Motion, filed.

August 14, 1975—Memorandum of Points and Authorities in Support of Motion to Determine the Sufficiency of Defts' Answers to Pltfs' Third Request for Admissions and for Consolidation and Expedited Consideration of this Motion, filed.

August 14, 1975—Affidavit of Richard J. Byrd, filed.

August 14, 1975—Certificate of Service certifying that Motion, Memorandum of Points & Authorities and Affidavit & proposed Order were served on counsel for Defts., Judge RRM, Judge DDW & Judge Bryan, filed.

August 15, 1975—Pltfs' Opening Brief on the Merits, filed.

August 19, 1975—Objections on behalf of ABA to evidence presented in depositions and Motion to strike, filed.

September 2, 1975—Deft., ABA's List of Exhibits filed. Copies to Judges.

September 2, 1975—Pltfs' List of Exh. (with bk of exh. recd) filed.

September 2, 1975—Pltfs' Response to deft. ABA's Obj. to deposition evidence & Motion to Strike filed.

September 2, 1975—Pltfs' Objection to certain evidence filed.

September 2, 1975—List of Exhibits (exh. attached) filed by State defts.

September 3, 1975—Motion for continuance with notice of hrng September 5, 1975, 8:30 am filed by deft., ABA.

September 3, 1975—Notice of Motion that on the 5th day of Sept., 1975, at 8:30, the Motion for Continuance will be brought on for hearing before this court, filed.

September 3, 1975—Motion for Continuance filed by Defts.

September 5, 1975—Pltfs' Opposition to Defts' Motion for Continuance, filed.

September 8, 1975—Pltfs' Supplemental Memorandum in Opposition to Defts' Motion for Continuance, filed.

September 8, 1975—Order granting Pltfs' motion for a

continuance from September 25, 1975 to be reset at 10 a.m. on September 25, 1975 for trial; Court will set a definite trial date on September 25, 1975; Pltf's will be given opportunity to file supplemental brief & additional time to reply to both primary & supplemental briefs will be granted Defts, Entered by RRM on September 8, 1975 & filed. Copies mailed as directed.

September 25, 1975—In Open Court: Merhige, Warriner, Judges Girard, OCR Appearances: Parties by counsel. Matter came on for setting of new hearing date. Court amended Order of September 8, 1975 from "Motion of Pltfs" to "Motion of Defts". New trial date set for March 25, 1976 at 10 A.M. Pltfs to file Supplemental brief by March 1, 1976; defts to file Reply Brief by March 15, 1976; Rebuttal brief by Pltfs to be filed by March 22, 1976. Proposed findings of facts and conclusions of law to be filed by March 23, 1976. Order to enter.

September 25, 1975—Ordered that unresolved issues will be tried on March 25, 1976 at 10 a.m.; Pltfs shall file supplemental briefs on or before March 1, 1976 & Defts to reply on or before March 15, 1975 with leave granted Pltfs to file such rebuttal brief on or before March 22, 1976; parties to file proposed findings of fact & conclusions of law on or before March 23, 1976 & counsel for Defts requested to keep Pltfs advised of all actions taken by Defts or committees which would have bearing on action, Entered by RRM on September 25, 1975 & filed. Copies mailed as directed.

February 4, 1976—Pltfs' Motion for Modification of Briefing Schedule, filed.

February 6, 1976—Opposition to pltfs' motion for modification of briefing schedule filed by dft., ABA.

February 6, 1976—Order modifying briefing schedule; pltfs to serve suppl. brief by February 25, 1976, defts to serve

reply by March 1, 1976 ent February 6, 1976, RRM, Jr., filed. Copies mailed counsel and judges.

February 6, 1976—Report on progress made by American Bar Association in consideration of possible amendments to Code of Professional Responsibility, filed.

February 9, 1976—Defts' Response to motion for modification of briefing schedule filed.

February 10, 1976—Deft American Bar Association's Motion for Modification of Modied Briefing Schedule, filed.

February 10, 1976—Order that the briefing schedules as presented by orders of September 25, 1975, and February 6, 1976, shall be modified to require Defts to serve their main brief on or before March 8, 1976; otherwise, said briefing schedule shall remain unchanged, ent. February 10, 1976, RRM, filed. Copies sent to all counsel of record.

February 11, 1976—Motion of Deft Va. State Bar for Modification of Modified Briefing Schedule, filed.

February 13, 1976—Pltfs' Opposition to Deft American Bar's Motion for Modification of Modified Briefing Schedule, filed.

February 25, 1976—Pltfs' supplemental memorandum, filed.

February 27, 1976—Motion for continuance of March 25, 1976 hrng filed by State Bar & Supreme Court defts with notice of hrng March 1, 1976, 10 a.m.

February 27, 1976—Pltfs' Opposition to Deft State Bar's Motion for Continuance, filed.

March 1, 1976—In Open Court: Merhige, J. Halasz, OCR Appearances: Parties by counsel. Matter came on for hearing on Deft. Va. State Bar etal's motion for a continuance. Motion heard; granted. Case cont'd to May 4, 1976 at 10:15 a.m.

March 1, 1976—Ordered that (a) Deft. ABA serve

amended answers to Pltfs' second request for admissions within 10 days of this date; (b) Deft. ABA's response to request for admissions 7, 27, 28 & 29 of Pltfs' second request for admissions is sufficient; (c) Deft. ABA serve amended answer to Pltfs' second request for admissions within 10 days as to admission number 15 insofar as it relates to Sandra DeMent's opinion but no response required as to alleged expertise in filed; further Ordered (a) Deft. VA State Bar & named individual Defts serve amended answers to Pltfs' second request for admissions within 10 days as to admissions 2, 5, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 22, 30, 32, 33 and 34; (b) Deft. VA State Bar & named individual Defts. serve an amended answer to Pltfs' second request for admissions as to admission request 15; further Ordered that all Defts serve an amended answer within 10 days of this Order as to Pltfs' third request for admissions; further Ordered that Defts' objection to evidence presented in depositions & motion to strike be & same hereby Denied, Entered by RRMjr on March 1, 1976 & filed. Copies mailed as directed.

March 2, 1976—Order continuing case until May 4, 1976 at 10:15 a.m.; deft's to file briefs within 10 days after Supreme Co. of Va. takes final action or April 23, 1976, whichever date comes first, with leave to pltfs to respond by noon, May 3, 1976; all parties to file proposed findings of fact and conclusions of law by 9:00 a.m., May 4, 1976, ent. March 2, 1976, RRMjr, filed. Copies mailed.

March 9, 1976—Amended Answer on behalf of the American Bar Association to Pltfs' Second and Third Request for Admissions, filed.

March 10, 1976—Order continuing hearing to May 18, 1976, 11:30 am ent March 10, 1976, RRM, Jr., filed. Copies mailed counsel and judges.

March 10, 1976—Order that pltfs' motion for expenses be taken under advisement ent March 10, 1976, RRM, Jr., filed. Copies to counsel and judges.

March 11, 1976—Amended Answer on behalf of State Defts to Pltfs' Second and Third Requests for Admissions, filed.

April 1, 1976—Deft's Notice to Take deposition of Michael Franck, Esq. on April 8, 1976, filed.

April 5, 1976—Notice to take deposition of Goeffrey C. Hazard, April 15, 1976, filed by dft. ABA.

April 12, 1976—Pltfs' motion for clarification of scope of additional discovery, Motion to compel immediate production of document, & for expedited consideration of said motions, filed.

April 12, 1976—Pltfs' Memorandum in support of motions for clarification of scope of additional discovery, to compel immediate production of document, & for expedited consideration, filed.

April 13, 1976—Objection on behalf of American Bar Association to Pltfs' Motion for Clarification of Scope of Depositions and Motion to Compel Immediate Production of Document, filed.

April 14, 1976—Deft's Notice to Take Deposition of Rothwell Lillard on April 14, 1976, filed.

April 14, 1976—Deposition of Michael Franck on April 8, 1976, rec'd.

April 15, 1976—Ordered that depositions noticed by defts for April 1976 are limited to matters pertinent to amendments of Deft's Code of Professional Responsibility of February 1976; further Ordered that within 10 days Deft. ABA to submit to counsel for Pltfs copy of transcript of proceedings conducted at ABA's Feb. 1976 meeting & no further discovery shall be permitted without

express approval of Court Entered by RRMjr on April 15, 1976 & filed. Copies mailed as directed.

April 19, 1976—Deposition of Rothwell J. Lillard taken April 14, 1976 on behalf of deft, rec'd.

April 20, 1976—Exhibits #1 & 2 to be attached to deposition of Mr. Rothwell J. Lillard taken on April 14, 1976, rec'd.

April 21, 1976—Pltfs' motion to modify procedures for filing of defts' opposition briefs, filed with Memorandum in support.

April 22, 1976—Motion by deft. ABA to allow parties to file additional proposed exh by May 4, 1976 & to be allowed until May 18, 1976 to file findings of fact & proposed conclusions of law filed.

April 23, 1976—Notice of appearance by John F. Rick, AAG as co-counsel for Defts, filed.

April 23, 1976—Defts VA State Bar & Supreme Court of VA, filed.

April 23, 1976—Deft ABA's Brief on Merits, filed.

April 27, 1976—Deft ABA's Opposition to Pltfs' Objections to Certain Deposition Evidence and Motion to Strike, filed.

April 29, 1976—Deposition of Geoffrey C. Hazard taken April 15, 1976 on behalf of defts, rec'd.

April 29, 1976—Order that all parties file any additional proposed exhibits on or before May 4, 1976, and all parties file their respective proposed findings of facts and conclusions of law by 9:00 a.m., May 14, 1976 instead of May 4, 1976, ent. April 29, 1976, RRM, filed. Copies mailed as directed.

April 30, 1976—Pltfs' Objections to certain deposition evidence, and motion to strike, filed.

May 3, 1976—Pltfs' supplemental list of exhibits, filed.

May 3, 1976—Pltfs' motion for additional time to file reply brief & memorandum in support thereof, filed.

May 3, 1976—Deft ABA's objection to pltfs' motion for additional time to file reply brief, filed.

May 4, 1976—Ordered that Pltfs may serve reply brief on Defts no later than May 14, 1976 Entered by RRMjr on May 4, 1976 & filed. Copies mailed to all counsel of record.

May 4, 1976—Defts' Response to Pltfs' Motion for Additional Time to File Reply Brief, filed.

May 4, 1976—Deft ABA's Additional Proposed Exhibits with Exhibit 16 attached.

May 4, 1976—Defts Va. St. Bar, et al's, Supplemental List of Exhibits, filed.

May 11, 1976—Deft. ABA's objections to Pltfs' exhibits, filed.

May 11, 1976—Defts Va. State Bar, et al's Objection to Pltfs' Exhibits, filed.

May 13, 1976—Vs. State Bar's Proposed Findings of Fact and Conclusions of Law, filed.

May 14, 1976—Findings of Fact and Conclusions of Law on behalf of the American Bar Association, filed.

May 14, 1976—Pltfs' Reply to ABA's Objections to Pltfs' Exhibits, filed.

May 14, 1976—Pltfs' Proposed Findings of Fact and Conclusions of Law, filed.

May 14, 1976—Pltfs' Reply Brief with attachments, filed.

May 18, 1976—In Open Court: Bryan, Sr., Merhige and Warriner, Judges. Halasz, OCR Matter came on for hearing of oral arguments on the merits. Arguments of parties heard. Case taken under advisement by the Court. (1 Hr. 18 Mins.)

May 26, 1976—Pltfs' Motion for Leave to File Supplemental Memorandum, filed.

May 28, 1976—Pltfs' Motion to Lodge Document with the Court, filed.

May 28, 1976—Order granting leave for pltfs' to filed Supplemental Memorandum within 10 days, defts may respond within 10 days, ent. May 28, 1976, RRMjr, filed. Copies mailed.

May 28 ,1976—Pltfs' Supplemental Memorandum, filed.

June 3, 1976—Supplemental Memorandum on behalf of The American Bar Association, filed.

June 24, 1976—Plaintiff's application for reimbursement pursuant to local rule 21, filed.

June 24, 1976—Plaintiff's motion for leave to file supplemental memorandum, filed.

June 24, 1976—Deft ABA's Objection to pltfs' application for reimbursement pursuant to Local Rule 21 on behalf of ABA with Memorandum in Support, filed.

July 7, 1976—Order granting pltfs' motion to file suppl memorandum; dfts allowed 10 days to respond; denying motion for reimbursement ent July 7, 1976, RRM, Jr., filed. Copies mailed.

July 7, 1976—Pltfs' Suppl. Memorandum filed.

August 19, 1976—Pltfs' Motion for Leave to File Supplemental Memorandum, filed.

November 15, 1976—Pltfs' Supplemental Memorandum, filed.

December 17, 1976—Opinion of RRMjr, Opinion of DDW concurring in part & dissenting in part & opinion of AVB dissenting, filed.

December 17, 1976—Ordered ABA is Dismissed; further Ordered prayers of State Defts granted with exception aforesaid; publication described in complaint as amended & proposed by Pltfs is declared valid with said exception;

Defts, successors, agents & attorneys be permanently enjoined & restrained from enforcement of rules & regulations issued by said Defts & described in complaint in respect to advertising by lawyers in VA; counsel for respective parties directed to meet & confer in effort to reach amicable adjustment of issue of counsel fees; counsel for Pltfs directed to apply to Court within 30 days of this date for day certain for purpose of all counsel & resident judges meeting & setting further schedules as may be requisite, Entered by RRMjr, DDW & AVB on December 17, 1976 & filed. Copies mailed to all counsel of record.

December 28, 1976—Ordered RRMjr's opinion amended, Entered by RRMjr on December 28, 1976 & filed. Copies mailed to all counsel of record.

January 5, 1977—Notice of appeal filed by plaintiff.

January 7, 1977—Copy of notice of appeal & docket entries sent to Clerk, U.S. Supreme Court.

January 25, 1977—VA State Bar, et al's Notice of Cross Appeal, filed.

January 26, 1977—Copy of notice of cross-appeal sent to Clerk, U.S. Supreme Court.

Mar. 1, 1977—Order directing transmittal or record to U.S. Supreme Court, requesting return of records on finality of action, ent'd, filed.

March 2, 1977—Record on appeal, XIII vols, mailed Clerk, U.S. Supreme Court, Certified, (3 vols pleadings, 1 vol Exhibits, 9 vols depositions).

August 2, 1977—Record in XIII Vols. (3 Vols. pleadings, 1 vol Exhibits, 9 vols depositions) rec'd from the Clerk, Supreme Court of the United States.

August 2, 1977—Certified Copy of Judgment of Supreme Court of the U.S. remanding this action to the U.S.D.C. for further consideration, filed.

November 9, 1977—Order that counsel to confer to agree upon appropriate decree in accord with U. S. Supreme Court mandate; if on agreement counsel to meet in conference room at Court on December 3, 1977 at 9:00 a.m., ent. November 9, 1977, RRMjr, filed. Copies mailed.

May 15, 1978—Ordered Deft. VA State Bar respond within 20 days to Pltfs' memorandum in support of Motion for an award of attorney's fees & costs; Pltf. shall file rebuttal memorandum within 10 days after receipt of Deft's memorandum; hearing on all outstanding issues will be conducted before members of three-judge court herein at 9 a.m. on July 20, 1978 at Alex. Division, Entered by RRMjr on May 15, 1978 & filed. Copies mailed to all counsel of record & Judges AVBsr RRMjr & DDW.

May 15, 1978—Pltfs' Motion for A Judgment On The Merits & Injunction Enjoining & Restraining Defts' From Interfering With Pltfs' & Pltfs' Members Constitutional Rights, filed.

May 15, 1978—Pltfs' Memorandum in Support of Pltfs' Motion for Judgment on the Merits with Attachments, filed.

May 15, 1978—Pltfs' Motion for An Order Declaring Defts' Liability For Attorneys' Fees & Costs, filed.

May 15, 1978—Pltfs' Memorandum In Support of Pltfs' Motion for An Award of Attorneys' Fees & Costs, filed.

June 5, 1978—Deft Va. State Bar's Response to Motion for an Order Declaring Defts' Liability for Fees and Costs, filed with Brief.

June 5, 1978—Deft Va. State Bar's Response to Motion for Judgment on the Merits, filed.

June 12, 1978—Pltfs' Motion for Extension of Time to File Rebuttal Memorandum, filed.

June 14, 1978—Ordered that pltf's shall have to and including July 3, 1978 to file their rebuttal Memorandum. Ent June 14, 1978, RRM,jr., and filed. Copies mailed.

June 14, 1978—Defts' Response to Motion for Extension of Time to File Rebuttal Memorandum filed.

June 30, 1978—Pltfs' Reply to Defts' Response to Motion for An Order Declaring Defts' Liability For Fees & Costs, filed.

July 20, 1978—In Open Court (at Alexandria): Bryan, Sr., Merhige, & Warriner, Judges. Appearances: Parties by Counsel. Matter came on for Hearing of Arguments. Pltfs' Motion for a Judgment on the merits and injunction enjoining and restraining defts and pltfs' motion for an order declaring defts' liability for attys' fees argued; motions taken under advisement by the court. (1 Hr. 5 Mins.)

August 17, 1978—Order that complaint dismissed with prejudice as to deft American Bar Association, ent. August 17, 1978, RRMjr, filed. Copies mailed.

December 21, 1978—Pltf's Motion for Expedited Consideration of Pltfs' Motion for a Judgment on the Merits and Permanent Injunction, filed.

December 21, 1978—Pltfs' Memo. in Support of Motion for Expedited Consideration, filed.

December 29, 1978—Defts' Response to Pltfs' Motion for Expedited Consideration, filed.

January 10, 1979—Pltfs' Reply Memo. in Support of Motion for Expedited Consideration, filed.

May 8, 1979—Ordered that the publication described in pltfs' complaint, as amended, is declared valid and constitutionally protected; Va. Code of Professional Responsibility Disciplinary Rule 2-102(A) (6) is declared unconstitutional on its face; the defts and all acting in concert therewith are enjoined from enforcement of Va.

Code of Professional Responsibility Disciplinary Rule 2-102(A) (6); the Supreme Court of Va. and the Hon. Lawrence W. I'Anson, are ordered to pay pltfs their costs and attorneys fees; Counsel are directed to meet and confer in an effort to reach agreement on the amount of attorneys fees to be paid. In the event parties are unsuccessful in resolving issue, counsel for pltfs are directed to file within 30 days a motion for an award of a specified amount for costs and attorneys fees. Defts may within 20 days thereafter respond to such a motion, after which pltfs shall have 10 days to replt. Ent May 8, 1979, by AVB, RRMjr, and DDW, filed. Copies mailed.

May 8, 1979—Memorandum Opinion of RRM, jr, filed.

May 8, 1979—Memorandum Opinion of DDW, Dissenting in Part and Concurring in Part, filed.

May 8, 1979—Letter of Albert V. Bryan, Sr., affirming decision of RRMjr, filed.

May 23, 1979—Defts' Petition for Rehearing, filed.

May 23, 1979—Defts' Petition for Extension of Time to Resolve Amount of Attorneys Fees, filed.

May 23, 1979—Defts' Memo in Support of Petition for Rehearing, filed.

May 23, 1979—Defts' Representation of Testimony to be Offered, filed.

May 30, 1979—Order that motions of defts for rehearing and extension of time to resolve amount of attys fees be Denied, ent. May 30, 1979, RRMJr, filed. Copies mailed.

June 6, 1979—Pltf's motion for extension to file motion for costs & fees filed.

June 7, 1979—Order, that the time allowed for counsel for pltfs' to file with this court a motion for an award of a specified amount for costs and attorneys fees accompanied by supporting data, is extended through June 18, 1979. Defts to respond within 20 days; pltfs' to reply 10

days thereafter. Ent. by RRM,JR. on June 7, 1979 & filed. Copies mailed.

June 7, 1979—Defts', Hon. Justice I'Anson & the Supreme Court of Va., Notice of Appeal, filed. ($5.00 fee paid.)

June 7, 1979—Pltfs' Notice of Cross Appeal, filed.

June 18, 1979—Pltfs' Motion for an Award of Fees and Costs, filed.

June 18, 1979—Pltfs' Memo in Support of Motion for Award of Fees, filed.

July 10, 1979—Deft's Response to Motion for Attorney's Fees, plus exhibits, filed.

July 16, 1979—Defts. Motion for Leave to File Supplemental Memorandum on Issue of Attorney's Fees, filed.

July 16, 1979—Defts. Supplemental Memorandum on Attorneys' Fees, with attachment, filed.

August 3, 1979—Pltfs' Motion for an Extension of Time, filed.

August 6, 1979—Ordered that Defts' Supplemental Memorandum on Attorney's Fees lodged with Court on July 16, 1979, be filed; pltfs may respond on or before August 31, 1979, ent RRMjr, August 6, 1979, filed. Copies mailed.

August 15, 1979—Pltfs' Reply to Defts' Supplemental Memorandum & To Defts' Response to Motion for Attorney's fees, filed.

August 20, 1979—Order directing Clerk to transmit entire record to U.S. Supreme Court, and that upon finality of action in Supreme Court, requests that record be returned to this office, ent'd, RRM, August 20, 1979.

August 20, 1979—Record on appeal, XIV vols, del'd to Clerk, U.S. Supreme Court.

COMPLAINT (MINUS ATTACHMENTS)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CONSUMERS UNION OF UNITED STATES, INC.
256 Washington Street
Mount Vernon, New York 10550
VIRGINIA CITIZENS CONSUMER COUNCIL
P. O. Box 777
Springfield, Virginia 22150

Plaintiffs,

v.

AMERICAN BAR ASSOCIATION
1155 East 60th Street
Chicago, Illinois 60637
VIRGINIA STATE BAR
5th and Franklin Streets
Richmond, Virginia 23219
HOWARD W. DOBBINS, individually and in his capacity
as President of the Virginia State Bar
P. O. Box 242
Richmond, Virginia 23202
ROTHWELL J. LILLARD, individually and in his capacity
as Chairman of the Legal Ethics Committee,
Virginia State Bar
4069 Chain Bridge Road
Fairfax, Virginia 22030
SUPREME COURT OF VIRGINIA
1101 East Broad Street
Richmond, Virginia 23219
HON. HAROLD S. SNEAD, individually and in his capacity
as Chief Justice of the Supreme Court of Virginia
1101 East Broad Street
Richmond, Virginia 23219

Defendants.

Civ. No. C.A. 75-0105

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND REQUEST FOR CONVENING OF THREE-JUDGE COURT

INTRODUCTION

1. This is an action seeking a declaration that defendants have violated the First and Fourteenth Amendment rights of plaintiffs and their members to gather, publish, convey and receive important factual information concerning attorneys practicing in Arlington County, Virginia, and seeking an injunction permanently enjoining the enforcement, operation, or execution by defendants or others of the provisions of DR 2-102 (A) (6) of the Codes of Professional Responsibility of the Virginia State Bar and of the American Bar Association.

THE PARTIES

2. Plaintiff Consumers Union of United States, Inc. ("Consumers Union") is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of the family income, and to advance the consumer interests of its hundreds of thousands of members, many of whom reside in Virginia and many of whom reside in this judicial district within the meaning of Rule 16(D) of this Court. Consumers Union's income is derived solely from the sale of *Consumer Reports* (magazine and TV) and other publications. In addition to reports on Consumers Union's own product testing, *Consumer Reports,* with its circulation of over 2 million, regularly carries articles on professional services, health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. *Consumer Reports* plans to publish during 1975 an article on how consumers should select a lawyer. Consumers Union's publications carry no advertising and receive no commercial support.

Plaintiff Virginia Citizens Consumer Council ("VCCC") is a nonprofit, statewide consumer organization chartered

by the State of Virginia in 1967 to promote the rights of its 550 member families and of the members of its affiliated member organizations, many of whom reside in Arlington County, to educate its members concerning goods and services, and to take action consistent with the needs and interests of consumers. Many of VCCC's members reside in this judicial district within the meaning of Rule 16(D) of this Court.

3. Defendant American Bar Association ("ABA") is a voluntary unincorporated association of members of the bars of various states, including Virginia. The ABA does, transacts and solicits business in Virginia and interprets its Code of Professional Responsibility ("the ABA Code") and takes other actions which it intends to and knows will have an effect on lawyers in Virginia. On August 12, 1969, the ABA adopted, and from time to time has amended, the ABA Code which is binding upon its members and which it seeks to have adopted by the states, including Virginia, as the basis for regulating the professional and commercial conduct of all lawyers.

Defendant Virginia State Bar ("State Bar") is an association organized and existing under the laws of the State of Virginia and maintains offices and transacts business in the Eastern District of Virginia. All persons who practice law in the State of Virginia are required to become and remain members of the State Bar. One of the functions of the State Bar is to insure that all of its members act in accordance with the standards of professional conduct as codified in the Virginia Code of Professional Responsibility ("the State Bar Code"). On or about October 13, 1970, defendant Supreme Court adopted the ABA Code to be the State Bar Code, and the State Bar Code remains in almost all respects identical to the ABA Code. In order to implement the State Bar Code, which is of general, state-wide applicability, the

State Bar has established a Legal Ethics Committee. The functions of this Committee include formally advising members of the State Bar concerning the conformity or nonconformity of proposed or actual conduct by such members with the State Bar Code, as well as receiving or initiating complaints against those members of the State Bar alleged to have violated the State Bar Code and investigating and holding hearings to determine whether to invoke formal sanctions against such members, including reprimand, suspension, and disbarment from the practice of law in the State of Virginia. Defendant Dobbins is the President and chief officer of the State Bar.

Defendant Rothwell J. Lillard is a citizen of the State of Virginia and resides in the Eastern District of Virginia. He is a member of the State Bar and is chairman of the Legal Ethics Committee of the State Bar.

Defendant Supreme Court of Virginia adopted and promulgated the State Bar Code, purporting to act under the authority of § 54-48 of the Virginia Code. Defendant Harold S. Snead is the Chief Justice of the Supreme Court of Virginia.

JURISDICTION

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1343(3).

THE FACTS

5. During 1974, plaintiff Consumers Union, through its legal and editorial staff, developed and prepared written materials to form the basis for a directory of all lawyers residing or practicing law in Arlington County, Virginia, to be published and distributed by plaintiffs Consumers Union and VCCC, for the purpose of assisting and educating consumers, including members of plaintiffs Consumers Union and VCCC, in the process of selecting an attorney. These

materials consist of (1) a questionnaire to be sent to all lawyers licensed to practice law in the State of Virginia who reside or maintain an office in Arlington County, designed to elicit information concerning each lawyer's office, education, legal activities, affiliations, areas of specialization, fee and billing practices, and client relations ("the Questionnaire"), and (2) an introduction to the directory which explains the manner in which the directory was prepared, guides the reader as to how to use the Questionnaire responses, and explains the limitations of the information contained therein, and which provides advice to consumers on how to select a lawyer ("the explanatory materials"). The Questionnaire and the explanatory materials are attached hereto as Exhibit A. The directory is to be a publication consisting of the explanatory materials and the responses to the Questionnaire, after verification and, if necessary, correction of the Questionnaire information by each responding attorney. The directory is to be sold and distributed at cost and the publishers will neither request nor accept any consideration from any lawyer for such listing.

6. Disciplinary Rules 2-101 and 2-102 of the State Bar Code and the ABA Code are virtually identical. Said rules of the State Bar Code provide, in pertinent part, as follows:

> (A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use, of any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.
>
> (B) A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf except as permitted under DR 2-103. This does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:
>
> (1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
> (2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
> (3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
> (4) In and on legal documents prepared by him.
> (5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.
>
> (C) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.
>
> DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.
>
> (A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:
>
> * * *
>
> (6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession.

A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-105 (A)(4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.

7. Beginning in August 1974, plaintiff Consumers Union. in order to enable it to gather, convey, publish and enable its members and VCCC's members to receive, information about lawyers residing or practicing law in Arlington County, requested that defendants ABA and State Bar review plaintiffs' proposed directory and certify it as in compliance with the ABA and State Bar Codes, as provided in Disciplinary Rule 2-102(A)(6) of such Codes. Defendant ABA informed plaintiffs that the ABA would not approve said directory because it contained information on fees, areas of specialization, and so forth. Defendant State Bar insisted that a member of the State Bar request a ruling on the matter and when Elaine Constance Major, a member of

the State Bar, requested such a ruling, the State Bar informed her, by letter dated January 17, 1975, that "DR 2-102(A)(6) makes it inappropriate for you to have your name included in the list."

8. Defendant ABA has issued certificates of compliance for, and defendant State Bar has permitted its members to list themselves in, numerous law lists and law directories which on their face violate the ABA Code and which are designed to enable lawyers to advertise their professional services to corporations, financial institutions, and other relatively wealthy potential clients, but which are of insufficient assistance to ordinary consumers seeking legal representation. In doing so, and in refusing to approve plaintiffs' directory, said defendants have acted arbitrarily, capriciously, and without rational basis, and have denied plaintiffs the equal protection of the laws.

9. Wholly as a result of the aforesaid actions by defendants, Ms. Major has refused and other lawyers in Arlington County have refused and/or will refuse to furnish to plaintiffs for inclusion in said directory information on fee practices, areas of specialization and so forth, or to be listed in or otherwise cooperate with plaintiffs in the publication of the directory, out of a present, reasonable apprehension that to furnish such information or to be listed in or cooperate with such a directory would violate Disciplinary Rule 2-102(A)(6) of the State Bar Code and could therefore subject them to disciplinary proceedings brought by the State Bar; and plaintiffs have thereby been prevented from gathering, conveying, and publishing such information on fee practices, areas of specialization, and so forth and the members of plaintiffs have been prevented from receiving such information.

VIOLATIONS OF LAW

10. Disciplinary Rule 2-102(A)(6) of the ABA Code and the State Bar Code is unconstitutional both on its face and as applied to the listing of attorneys in, and the publication of, the directory sought to be published by plaintiffs, in that said Rule has had, and will continue to have, an actual chilling effect and has constituted, and will continue to constitute, a prior restraint upon the exercise by plaintiffs and their members of their rights under the First and Fourteenth Amendments to the United States Constitution to gather, publish, convey, and receive important factual information necessary to enable such persons to secure the most effective and satisfactory legal representation.

11. The aforesaid actions by defendants have deprived, and will continue to deprive:

(a) plaintiffs and plaintiffs' members of their constitutional rights to gather, publish, convey, and receive important factual information necessary to enable such persons to secure the most effective and satisfactory legal representation, in violation of the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983; and

(b) plaintiffs and plaintiffs' members of their constitutional right to equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983;

12. Plaintiffs have been and will continue to be irreparably harmed by the aforesaid violations of law, and have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray:

(1) that this Court convene a three-judge district court pursuant to 28 U.S.C. § 2281 and 2284;

(2) that this Court enter a judgment declaring that Disciplinary Rule 2-102(A)(6) of the ABA Code and the State Bar Code is unconstitutional both on its face and as applied by defendants to restrict the gathering of information for the listing of attorneys in, and the publication of, the directory sought to be published by plaintiffs, for violation of the First and Fourteenth Amendments to the United States Constitution, and that defendants have therefore violated said Amendments and 42 U.S.C. § 1983;

(3) that this Court issue a permanent injunction restraining and prohibiting the enforcement, operation, or execution of Disciplinary Rule 2-102(A)(6) by defendants or others;

(4) that this Court grant plaintiffs reasonable counsel fees, as well as the costs and disbursements of this action; and

(5) that this Court grant such other and further relief as may be just and proper.

Respectfully submitted,

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202/785-1906
(Member of the District of Columbia Bar)
Counsel for Plaintiffs

Dated: February . ., 1975

THE RULE CHALLENGED BY CONSUMERS UNION (DR 2-102(A)(6))

The challenged rule of the Supreme court of Virginia is set forth in the complaint, *supra,* at 25-26.

THE RULE AS AMENDED BY THE AMERICAN BAR ASSOCIATION IN FEBRUARY 1976

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

A listing in a reputable law list, legal directory, a directory published by a state, county or local bar association, or the classified section of telephone company directories giving brief biographical and other informative data. A law list or any directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list or any directory is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice, to the extent permitted by the authority having jurisdiction under state law over the subject and in accordance with rules prescribed by that authority; date and place of birth; date and place of admission to the bar of state and federal courts; schools at-

tended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service, posts of honor, legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented; whether credit cards or other credit arrangements are accepted; office and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services; provided, all such published data shall be disseminated only to the extent and in such format and language uniformly applicable to all lawyers, as prescribed by the authority having jurisdiction by state law over the subject.

PROPOSED AMENDMENTS TO VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY

April 1, 1976

Amend DR 2-102 (A) (5) and DR 2-102 (A) (6) as follows (additions are *underscored,* deletions appear in parenthesis):

(A) A lawyer or law firm shall not use *or participate in the use of* professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

* * *

(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides and in the city directory of the city in which his or the firm's office is located; but the listing *in the alphabetical section* may give only the name of the lawyer or law firm, the fact he is a lawyer, addresses, and telephone numbers, *and the listing in the classified section must comply with the provisions of DR 2-102 (a) (6).* The listing shall not be in distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified section shall not be under a heading or classification other than "Attorneys" or Lawyers," except that additional headings or classifications descriptive of the types of practice referred to in DR 2-105 are permitted.

(6) A listing in a reputable law list, (or) legal directory, *a directory published by a state, county or local bar association, or the classified section of*

telephone company directories giving brief biographical and other informative data. A law list or *any* directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list *or any directory* is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates (;), a statement that practice is limited to one or more fields of law (;), *or* a statement that the lawyer or law firm specializes in a particular field or law practice, *to the extent permitted and in accordance with rules prescribed by the Supreme Court of Virginia;* (but only if authorized under DR 2-105 (A) (4);) date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references and, with their consent, names of clients regularly represented: *whether credit arrangements are accepted; office and other hours of availability; a statement of legal fees, if any, for an initial consultation and the availability upon request after consultation of an estimate of the fee to be charged for the specific services.*

ORDER OF SUPREME COURT OF VIRGINIA

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 20th day of April, 1976.

In the Matter of

Petition by the Council of the Virginia State Bar to amend DR 2-102 (A) (5) and DR 2-102 (A) (6) of the Rules of the Supreme Court of Virginia, Part Six, Section II.

On April 6, 1976, came the Virginia State Bar Council, by Philip M. Sadler, President of the Virginia State Bar, and filed a petition praying that the Court amend the Virginia Code of Professional Responsibility as fully set out in said petition.

And the Court having maturely considered the said petition, is of opinion that the proposed amendments to Rules DR 2-102 (A) (5) and DR 2-102 (A) (6) of the Rules of the Supreme Court of Virginia, Part Six, Section II, will not serve the best interests of the public or the legal profession, and therefore the petition for the amendments is denied.

A Copy, Teste:

H. TURNER, Clerk

DRAFT ORDER SUBMITTED BY DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CONSUMER UNION OF UNITED STATES, INC., *et al.*,
Plaintiffs,

v.

AMERICAN BAR ASSOCIATION, et al.,
Defendants.

Civil Action No. 75-0105-R

MEMORANDUM AND ORDER

On June 29, 1977, the U.S. Supreme Court vacated the judgment of this Court in the above-captioned case and remanded the case to this Court for further consideration in the light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). Having reconsidered this matter as ordered by the Supreme Court, Judges Bryan, Merhige and Warriner unanimously adopt and reconfirm the Court's previous order in this case, except insofar as that order did not permit publication by the plaintiffs of certain information as to the fees charged by members of the Bar of Virginia for services.

In light of the decision of the Supreme Court in *Bates, supra,* the Court holds that, pursuant to the First and Fourteenth Amendments, plaintiffs are entitled to gather and publish, and their members are entitled to receive, truthful information as to the fees at which lawyers will perform routine legal services, so long as the information

published is not false, misleading or deceptive. It is therefore now

ADJUDGED AND ORDERED that the prayers of the complaint, as amended, as to the State defendants, be and they are hereby granted; that accordingly the publication described in Appendix A to the affidavit of Mark Silbergeld, dated May 12, 1978, is approved by the Court, and hereby is declared to be valid for publication; and, to that extent, defendants, their successors in office, their agents and attorneys, be and they are hereby, permanently enjoined and restrained from enforcement of rules and regulations issued by defendants, insofar as such rules and regulations prohibit lawyers practicing in the Commonwealth of Virginia from providing such information to plaintiffs for publication.

Let the Clerk send copies of this Memorandum and Order to all counsel of record.

Done this .. day of ....., 1978, at Richmond, Virginia.

United States District Judge

United States District Judge

United States District Judge

DRAFT ORDER SUBMITTED BY PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

CONSUMERS UNION OF UNITED STATES, INC., *et al.*,

Plaintiffs,

v.

AMERICAN BAR ASSOCIATION,

Defendants.

Civil Action No. 75-0105-R

ORDER

On June 29, 1977, the U.S. Supreme Court vacated the judgment of this Court in the above-captioned case and remanded the case to this Court for further consideration in the light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). Having reconsidered this matter as ordered by the Supreme Court, Judges Bryan, Merhige and Warriner unanimously adopt and reconfirm the Court's previous order and findings in this case, except that portion of the Order and findings which prohibited the publication of information relating to prices charged by lawyers.

In light of the decision of the Supreme Court in *Bates, supra,* the Court finds that, pursuant to the First and Fourteenth Amendments, plaintiffs are entitled to gather and publish, and their members are entitled to receive, information on the fees at which lawyers will perform routine

legal services and other fee information, so long as the information is not false, deceptive or misleading.

The Court having received the directory proposed to be published by plaintiffs finds that the proposed directory will not mislead the readers.

It is therefore now DECLARED THAT:

(1) Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility violates the First and Fourteenth Amendments of the U.S. Constitution and defendants Virginia State Bar and Virginia Supreme Court therefore have violated said Amendments and 42 U.S.C. Section 1983;

(2) Any provisions of the Virginia Code of Professional Responsibility that prohibits, or has a chilling effect upon, the gathering, publication, or receipt of a law list or directory because it contains the types of information about attorneys contained in plaintiffs' Memorandum in Support of Plaintiffs' Motion for Judgment on the Merits, is in violation of said Amendments and 42 U.S.C. Section 1983.

It therefore is now ORDERED AND ADJUDGED that:

(1)(a) the Virginia State Bar and the Virginia Supreme Court, their officers, successors in office, agents, servants, employees and attorneys are enjoined from directly or indirectly promulgating, interpreting, administering, maintaining, or enforcing against plaintiffs or others Disciplinary Rule 2-102(A)(6) or any other provision of the Virginia Code of Professional Responsibility that prohibits, or has a chilling effect upon, the gathering, publication, or receipt of a law list on the ground that it contains the types of information about attorneys contained in plaintiffs' proposed revised directory.

(b) Defendant Virginia State Bar (1) within thirty (30) days of the date hereof shall issue to plaintiffs an official certificate stating that plaintiffs' proposed directory

is in compliance with all lawful provisions of the Virginia Code of Professional Responsibility, and (2) in its next official mailing to members of the Virginia State Bar shall include an official notice to the effect that Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility has been declared unconstitutional by this Court and that members of the Virginia State Bar may not be disciplined for being listed in plaintiffs' proposed directory, so long as the information furnished by them does not violate any lawful provisions of said Code.

Let the Clerk send copies of this Order to all counsel of record.

Done this .. day of ....., 1978, at Richmond, Virginia.

United States District Judge

United States District Judge

United States District Judge

Supreme Court, U. S.
FILED
SEP 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
and
LAWRENCE W. I'ANSON,
In His Personal and Official Capacity
As Chief Justice of the Supreme Court of Virginia,
Appellants,

v.

CONSUMERS UNION
OF THE UNITED STATES, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
and
LAWRENCE W. I'ANSON,
In His Personal and Official Capacity
As Chief Justice of the Supreme Court of Virginia,

Appellants,

v.

CONSUMERS UNION
OF THE UNITED STATES, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

Appellees move this Court to dismiss the appeal herein or to affirm the judgment of the United States District Court for the Eastern District of Virginia on the grounds that the court lacks jurisdiction over some of the questions

raised on appeal and that all of the questions raised are so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

1. Can the Virginia Supreme Court raise new arguments on appeal to the Supreme Court to overturn a district court order which the Virginia Supreme Court itself proposed?

2. Does judicial immunity preclude a district court from declaring Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility unconstitutional on its face and from enjoining the Virginia Supreme Court from enforcing the Rule?

3. Did Congress abolish judicial immunity from awards granted under the Civil Rights Attorney's Fees Awards Act?

4. Did the District Court abuse its discretion by awarding fees against the Virginia Supreme Court, even though no special circumstances render such an award unjust?

STATEMENT OF THE CASE

On February 27, 1975, Consumers Union of United States, Inc. ("Consumers Union") and Virginia Citizens Consumer Council, appellees, brought this suit under the first and fourteenth amendments and 42 U.S.C. Section 1983. Their complaint alleged that Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility ("the Rule") infringes on their rights to gather and publish, and their members' right to receive, important factual information about services offered by individual lawyers. They requested (1) the convening of a three-judge court; (2) a declaratory judgment that the Rule is unconstitutional on its face and as applied by defendants

to restrict the gathering of information for and publication of plaintiffs' proposed Arlington County, Virginia, directory of lawyers' services, and (3) an injunction enjoining the Virginia Supreme Court ("Virginia Court") from enforcing the Rule.

A three-judge district court was convened on April 14, 1975. On May 8, 1979, that court granted plaintiffs all the relief sought in their complaint, with one exception. Defendants were not enjoined from enforcing the rule with respect to information on fees charged by attorneys, other than an initial consultation fee. The Court explicitly enjoined all defendants from enforcing the Rule to the extent that the Rule infringed on constitutional rights.

Both parties appealed. While the appeals were pending, this Court decided *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which established that the advertising of information regarding fees for routine legal services enjoys constitutional protection. Two days after the *Bates* decision, this Court vacated the district court decision in this case and remanded for a decision consistent with *Bates*.

On remand, defendants conceded plaintiffs' entitlement to the relief sought in their complaint and filed a proposed Order (App. 1a) which stated:

> ADJUDGED AND ORDERED that the prayers of the complaint, as amended, as to the State defendants, be and they are hereby granted . . . and, to that extent, defendants, their successors in office, their agents and attorneys, be and they are hereby, permanently enjoined and restrained from enforcement of rules and regulations issued by defendants, insofar as such rules and regulations prohibit lawyers practicing in the

Commonwealth of Virginia from providing such information to plaintiffs for publication.

On May 8, 1979, the district court ruled that plaintiffs' entire directory, as amended, is constitutionally protected and that Disciplinary Rule 2-102(A)(6) is unconstitutional on its face, and enjoined both defendants from enforcing the Rule. After explaining its reasons for rejecting each of defendants' arguments that special circumstances rendered an award against the Virginia Court unjust, the Court directed the Virginia Court to pay plaintiffs' costs and reasonable attorneys' fees. The court permitted plaintiffs 30 days to file a motion claiming a specific award of fees. No decision has yet been rendered on plaintiffs' motion which was pending when appellants' jurisdictional statement was filed. No fees were awarded against the Virginia Bar because the district court found that the Bar had made efforts to amend the rule to conform to what the Bar perceived as constitutional requirements, but was unable to do so because of opposition from the Virginia Court. The district court noted that similar circumstances were not present to render an award against the Virginia Court unjust. It observed, further, that the Virginia Court had yet to amend the Rule to conform with the clear constitutional requirements of *Bates*, a decision handed down more than twenty months earlier.

The Virginia Court petitioned the district court for a rehearing, claiming that "since Bates was decided the Virginia Court has been presented with no opportunity to change the rules" because the Virginia Bar had submitted no proposed amendments to the advertising provisions.[1] The petition for rehearing was denied May 30, 1979.

[1] Memorandum in Support of Petition for Rehearing at 13.

MOTION TO DISMISS

I. THIS COURT LACKS JURISDICTION OVER THE CHIEF JUSTICE'S APPEAL IN HIS PERSONAL CAPACITY FROM THE FEE AWARD.

The district court awarded fees against the Chief Justice of the Virginia Supreme Court in his official, but not in his personal, capacity. Thus, the Chief Justice's appeal in his personal capacity from that award should be dismissed.

II. THE VIRGINIA COURT CANNOT CONTEST FOR THE FIRST TIME ON APPEAL AN ORDER IT PROPOSED TO THE DISTRICT COURT.

Throughout the more than four years of litigation that preceeded the district court decision, the Virginia Court never claimed or even suggested that judicial immunity shields it from the declaratory or injunctive relief plaintiffs sought. To the contrary, the Virginia Court *conceded* the propriety of such relief by submitting to the district court a proposed order that, if adopted, would declare the Rule unconstitutional on its face and enjoin the Virginia Court from enforcing the Rule. After oral argument on remand, at which defendants strongly urged the district court to adopt their proposed order rather than plaintiffs', the district court issued an order that, like defendants' Order, declares the Rule unconstitutional on its face and enjoins the Virginia Court from enforcing the Rule. Now, on appeal to the Supreme Court, the Virginia Court challenges the very order it proposed.

By failing to raise their defense earlier, and by proposing the very relief they now contest, appellants waived any immunity from declaratory or injunctive relief that they might be held to enjoy.[2] *See, Helvering v. Wood*,

[2] Appellees believe no such judicial immunity exists, *see* pp. 7-12, *infra*.

309 U.S. 344, 348-9 (1940); *California v. Taylor*, 353 U.S. 553, 556 n. 2 (1957).

Moreover, they cannot raise new immunity defenses on appeal to the Supreme Court, because, as explained in *Duignan v. United States*, 274 U.S. 195, 200 (1927):

> [t]his court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

Accord, Helvering v. Wood, supra. See Youakim v. Miller, 425 U.S. 231, 234-235 (1976). *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976). No extraordinary circumstances are presented by this case. No injustice will result if this Court declines to review the decision below, because the district court, without any doubt, properly found the Rule to be unconstitutional on its face. *See Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (See especially the concurring opinion of Black, J.,); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)[3] The Rule, therefore, cannot be enforced by the Virginia Court, *Ex Parte Virginia*, 100 U.S. 339, 348 (1879), so that dismissal of this appeal on the merits will merely require the Virginia

[3] By permitting only specified – very limited – information in attorney directories, the Rule prohibits the publication of a significant amount of constitutionally protected information regarding attorneys' services, some of which was at issue in this case, and even less of which was at issue in *Bates*. To declare the Rule unconstitutional only as applied to plaintiffs would leave in effect a statute capable of many unconstitutional applications, so that the district court correctly found this overbroad Rule to be unconstitutional on its face. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Smith v. California*, 361 U.S. 147, 151 (1959); *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940).

Court to do that which it must do anyway to comply with the U.S. Constitution.

Furthermore, as observed in *Goldstein v. Cox*, 396 U.S. 471, 478 (1970):

> [t]his Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.'

Thus, appellants' new claims on appeal should be dismissed.

MOTION TO AFFIRM

I. JUDICIAL IMMUNITY DOES NOT SHIELD JUDGES FROM A DECLARATORY JUDGMENT AND INJUNCTION ENJOINING ENFORCEMENT OF AN UNCONSTITUTIONAL RULE.

In any event, the district court's declaratory judgment and injunction are so eminently correct that appellants' reversal of their previous position raises no substantial questions.[4] Although judges are absolutely immune from

[4] The Virginia Court certainly does not enjoy judicial immunity from the declaratory judgment that its Disciplinary Rule is unconstitutional, because this Rule was the result of an administrative, rather than judicial act. *See Ex parte Virginia*, 100 U.S. 339 (1879); *Roudebush v. Hartke*, 405 U.S. 15 (1972); *Lynch v. Johnson*, 420 F. 2d 818 (6th Cir. 1970) (cited with approval in *Stump v. Sparkman*, 98 S. Ct. 1099 (1978). The Rule was not a decision in a case litigated before the Court, but instead was issued pursuant

damage awards, *Pierson v. Ray*, 386 U.S. 547 (1967), they are not immune from declaratory and injunctive relief enjoining the enforcement of a statute or rule that is unconstitutional on its face. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965).

Appellants mistakenly contend that the lower courts are divided on this issue. Quite to the contrary, the lower courts, in cases involving litigants who seek to enjoin the enforcement of an unconstitutional statute, uniformly find judicial immunity not to be a barrier to such relief.[5]

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to regulatory powers the Virginia legislature delegated to the Virginia Court. (The Code of Virginia, Section 54-48, provides that "[t]he Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations: . . . . (b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law. . . .").

Amicus Conference of Chief Justices erroneously claims that the Virginia Court was not a proper or necessary party to this suit. However, just as administrative agencies are proper and necessary parties to suits challenging their rules and regulations, so too is the Virginia Court a necessary and proper party to this action contesting the constitutionality of its Rule.

[5] *Law Students Civil Rights Research Coun., Inc. v. Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (Friendly, J.), *reversed on other grounds*, 401 U.S. 154 (1971). ("We fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed."); *Fowler v. Alexander*, 478 F. 2d 694 (4th Cir. 1973); *Cassidy v. Ceci*, 320 F. Supp. 223 (E.D. Wisc. 1970); *Larsen v. Gallogly*, 361 F. Supp. 305 (D.R.I. 1973), *vacated as moot*, 420 U.S. 904 (1975); *Rakes v. Coleman*, 318 F. Supp. 818 (E.D. Va. 1970); *Boddie v. State of Connecticut*, 286 F. Supp. 968 (D. Conn. 1968), *rev'd on other grounds*, 401 U.S. 371

It is true that injunctive relief has been denied, in some cases, to litigants who raise uncertain constitutional claims to obtain review in federal court of a state court decision on matters committed to the discretion of state courts.[6]

(1970). *Compare Adkins v. Underwood*, 370 F. Supp. 510 (N.D. Ill. 1974) *aff'd on other grounds*, 520 F. 2d 890 (7th Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975).

Lower courts also concur that judges may be enjoined from violating well-established constitutional rights. *United States v. Clark*, 249 F. Supp. 720, 727 (S.D. Ala. 1965) (State judge interfered with rights of black citizens to register to vote and to use public accommodations on equal basis with whites); *Bramlett v. Peterson*, 307 F. Supp. 1311 (M.D. Fla. 1969) (State judge failed to inform indigents of their sixth amendment right to court-appointed counsel); *Phillips v. Cole*, 298 F. Supp. 1049 (N.D. Miss. 1968) (State judge failed to inform juveniles of their sixth amendment right to counsel). *See also United States v. McLeod*, 385 F. 2d 734 (5th Cir. 1967). *Compare Peckham v. Scanlon*, 241 F. 2d 761 (7th Cir. 1957); *Mirvin v. Justices of the Supreme Court*, 415 F. Supp. 1178, 1192 (D. Nev. 1976).

[6] *Mirin v. Justices of the Supreme Court of Nevada*, 415 F. Supp. 1178 (D. Nev. 1976) (after finding appellant's constitutional claims to be entirely without merit, court held that judicial immunity prevented the federal court from reviewing state court decisions finding that appellant had violated state taxicab licensing laws); *Adkins v.. Underwood*, 370 F. Supp. 510 (N.D. Ill. 1974) *aff'd on other grounds*, 520 F. 2d 890 (7th Cir. 1975, *cert. denied*, 423 U.S. 1017 (1975) (plaintiff sought federal court order enjoining the enforcement of a state court decision that plaintiff's wrongful death action could not be brought in Illinois on grounds of forum non conveniens. After noting that the case did not involve a statute unconstitutional on its face, but instead a discretionary state court judgment, the federal court refused to intervene); *Peckham v. Scanlon*, 241 F. 2d 761 (7th Cir. 1957) (after finding a prisoner's constitutional claims to be dubious, court refused to interfere with discretionary state court judgments); *Brown v. Dunne*, 409 F. 2d 341 (7th Cir. 1969) (federal court refused to determine if state

For example, in *Cheramie v. Tucker*, 493 F. 2d 586 (5th Cir. 1974), the plaintiff-appellant sought review of a state court decision which, he alleged, had erroneously held that the defendant was not negligent and had thereby derprived the plaintiff of his due process rights. Refusing to interfere with the discretion of the state court, the federal court found judicial immunity to preclude the relief sought.[7]

court mishandled probate proceedings); *Tate v. Arnold*, 223 F. 2d 782 (8th Cir. 1955) (federal court refused to determine if state judge improperly issued writs of garnishment against appellant); *Falkner v. Blanton*, 488 F.2d 551 (5th Cir. 1974), *cert. denied*, 419 U.S. 1080, *rehearing denied*, 419 U.S. 977 (Douglas, J. dissenting) (federal court refused to determine if probate judge erroneously denied appellant property); *MacKay v. Nesbett*, 285 F. Supp. 498 (D. Ala. 1968), *aff'd*, 412 F. 2d 847 (9th Cir. 1969) (federal court declined to review state court decision to suspend a member of the bar from the practice of law for one year; *Gay v. Heller*, 252 F. 2d 313 (5th Cir. 1958) (judicial immunity found to prevent review of state court probate proceedings).

In some cases involving discretionary state court judgments, federal courts have found that judicial immunity does not prevent declaratory or injunctive relief. *Littleton v. Berbling*, 468 F. 2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom. O'Shea v. Littleton*, 414 U.S. 488 (1974); *Stephen v. Drew*, 359 F. Supp. 746 (E.D. Va. 1970); *Wallace v. McDonald*, 369 F. Supp. 180, 188 (E.D. N.Y. 1973); *United States v. Clark*, 249 F. Supp. 720, 727 (S.D. Ala. 1965); *Bramlett v. Peterson*, 307 F. Supp. 1311, 1321 (M.D. Fla. 1969); *Phillips v. Cole*, 298 F. Supp. 1049 (N.D. Miss. 1968); *DeVita v. Sills*, 422 F. 2d 1172 (3rd Cir. 1970); *Staud v. Stewart*, 366 F. Supp. 1398 (E.D. Pa. 1973), *aff'd*, 547 F. 2d 1164 (3rd Cir. 1977). *See also Jacobson v. Schaefer*, 441 F.2d 127, 130 (7th Cir. 1971); *United States v. McLeod*, 385 F. 2d 734 (5th Cir. 1967).

Thus, the lower courts are divided on whether discretionary state court judgments may be enjoined, but not on whether judges can be enjoined from enforcing unconstitutional statutes or rules.

[7] In *Cheramie v. Tucker*, e.g., 493 F. 2d 586, 588 (5th Cir. 1974), the court acknowledged that other federal courts had issued

And several federal courts, faced with similar suits, also have found judicial immunity to bar injunctive relief where it would disturb the normal processes for review of state court errors.[8] As stated in *Gay v. Heller*, 252 F. 2d 313, 315 (5th Cir. 1958), "[t]he normal way to correct errors in the trial or other disposition of a law suit is by appeal, not by suing the judge."

In contrast, the suit before this Court does not attempt to interfere either with discretionary judgments of a state court or with the normal procedures for review of those judgments. Instead, it merely seeks an injunction enjoining the enforcement of a rule that is clearly unconstitutional on its face. The decision, at issue, merely directs the state court to perform a ministerial act required by the U.S. Constitution. Judicial immunity does not prevent such relief.[9]

Moreover, 42 U.S.C. Section 1983 further confirms that judicial immunity does not lie against an injunction issued pursuant to this Act. As explained in *Mitchum v. Foster*, 407 U.S. 225 (1972), "[t]he very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action

injunctions against judges which did not interfere with their discretionary functions. However, the *Cheramie* court denied declaratory and injunctive relief because "[i]n the instant case, the requested relief would directly and irrebutably interfere with a discretionary judicial function." *Id* at 588. (footnote omitted).

[8] *Adkins v. Underwood*, 370 F. Supp. 510, 515 (N.D. Ill. 1974), *aff'd on other grounds*, 520 F. 2d 890 (7th Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975). *Gay v. Heller*, 252 F.2d 313, 315 (5th Cir. 1958).

[9] See n. 5, *supra*.

under color of state law, 'whether that action be executive, legislative or *judicial*.' " 407 U.S. at 242 (emphasis added). An injunction enjoining the enforcement of a Rule that is unconstitutional on its face, in violation of Section 1983, falls squarely within the relief authorized by Congress in passing Section 1983. *Law Students Civil Rights Research Coun., Inc. v. Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (Friendly, J.), *reversed on other grounds*, 401 U.S. 154 (1971). Thus, Section 1983 abolished any judicial immunity which might exist against such injunctive relief. *Mitchum, supra.*

In summary, because this Court's decision in *Dombrowski* establishes that judicial immunity does not shield a state court from a declaratory judgment finding its Rules unconstitutional and an injunction enjoining its enforcement of those Rules, and because this Court's decision in *Mitchum* further establishes that 42 U.S.C. Section 1983 abolished any immunities that might preclude such relief, the district court's decision should be affirmed.

II. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT ABOLISHED JUDICIAL IMMUNITY.

The appeal from the district court's fee award similarly raises no substantial issue. *Hutto v. Finney*, 437 U.S. 678 (1978), established that *all* state governmental immunities were abolished by Congress for awards granted under the Civil Rights Attorney's Fees Awards Act of 1976:

> The Act itself *could not be broader.* It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions.

> The legislative history is equally plain: [I]t is intended that the attorneys fees, like other items of costs, will be collected either directly from the official in his official capacity, from funds of his agency or under his control, or from the State or local government [whether or not the agency or government is a named party].

437 U.S. at 694, citing S. Rep. No. 94-1011, at 5. (emphasis added).

In addition, the House Report specifically rejected extending *Pierson v. Ray* judicial immunity from damage awards to fee awards under CRAFAA:[10]

> [I]n some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] [citing *Pierson v. Ray*, 386 U.S. 547 (1967)]. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases . . . only

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10 *Amicus* Conference of Chief Justices mistakenly suggests that the House Report should not be used to determine Congressional intent because the Senate Bill, rather than the House version, became law. Brief *Amicus Curiae* on Behalf of the Conference of Chief Justices in Support of the Jurisdictional Statement at 14. However, the only difference between the two versions was the statutes under which fees could be awarded. Each used identical language to authorize courts to award fees ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.") Thus, the House's statement that this language abolishes judicial immunity is an expression of Congressional intent.

injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976).[11]

Because Section 1988 awards are paid by the state, rather than by judges, Congress' abolition of judicial immunity against fee awards should neither instill fear of personal consequences in judges nor interfere with impartial judicial decisionmaking, and thus does not interfere with the purposes of judicial immunity. *See Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 347 (1871). Instead, such awards serve to assure that precious constitutional rights are adequately protected and to fulfill the objectives of 42 U.S.C. Section 1988.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING FEES AGAINST THE VIRGINIA COURT.

Under 42 U.S.C. Section 1988, "the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Because prevailing parties act as private attorneys' general vindicating important constitutional right, they are entitled to an award under Section 1988 unless special circumstances would render an award manifestly unjust. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976) and H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 9 (1976), citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

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11 Reviewing this legislative history, the lower courts have held that judicial immunity does not apply to 42 U.S.C. Section 1988. *Alsager v. District Court of Polk City, Iowa*, 447 F. Supp. 572 (S.D. Iowa 1977); *Mudd v. Busse*, Civil No. F 75-12 (N.D. Ill., decided April 7, 1977).

Appellants do not offer any facts that establish special circumstances or suggest that the fee award they contest is manifestly unjust. Instead, they claim that the district court awarded fees solely because the Virginia Court failed to amend its Rule for almost two years after *Bates* established its unconstitutionality and argue that the fee award is improper because they were under no obligation to amend that Rule.[12]

Appellants misread the district court opinion. It was not their extraordinary delay, but the absence of special circumstances, that persuaded the district court to award fees.[13] The district court decision reviews and rejects each of the reasons given by the Virginia Court why an award would be unjust.[14] Finding no special circumstances, the district court was required to and did award fees to plaintiffs.

Indeed, the argument that the Virginia Court properly delayed amending the Rule, even if correct, would not render a fee award against appellants unjust. The district court award falls well within its discretion and should be summarily affirmed.

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12 Jurisdictional Statement at 16.

13 *Id.* at App. 10-12.

14 *Id.*

CONCLUSION

In conclusion, because appellants improperly raise new arguments on appeal to contest a declaratory judgment and injunction they proposed, their appeal should be dismissed. Moreover, because the district court's declaratory judgment, injunction, and award of attorneys fees are so eminently correct, and appellants' judicial immunity arguments so contrary to previous decisions of this Court, the district court's decision should be summarily affirmed.

Respectfully submitted.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

CONSUMERS UNION OF UNITED STATES, INC., et al., Plaintiffs, v. AMERICAN BAR ASSOCIATION, et al., Defendants.	Civil Action No. 75-0105-R

MEMORANDUM AND ORDER

On June 29, 1977, the U.S. Supreme Court vacated the judgment of this Court in the above-captioned case and remanded the case to this Court for further consideration in light of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Having reconsidered this matter as ordered by the Supreme Court, Judges Bryan, Merhige and Warriner unanimously adopt and reconfirm the Court's previous order in this case, except insofar as that order did not permit publication by the plaintiffs of certain information as to the fees charged by members of the Bar of Virginia for services.

In light of the decision of the Supreme Court in *Bates, supra*, the Court holds that, pursuant to the First and Fourteenth Amendments, plaintiffs are entitled to gather and publish, and their members are entitled to receive, truthful information as to the fees at which lawyers will per-

form legal services, so long as the information published is not false, misleading or deceptive.

It is therefore now

ADJUDGED AND ORDERED that the prayers of the complaint, as amended, as to the State defendants, be and there are hereby granted; that accordingly the publication described in Appendix A to the affidavit of Mark Silbergeld, dated May 12, 1978, is approved by the Court, and hereby is declared to be valid for publication; and, to that extent, defendants, their successors in office, their agents and attorneys, be and they are hereby, permanently enjoined and restrained from enforcement of rules and regulations issued by defendants, insofar as such rules and regulations prohibit lawyers practicing in the Commonwealth of Virginia from providing such information to plaintiffs for publication.

Let the Clerk send copies of this Memorandum and Order to all counsel of record.

Done this ____ day of _____ , 1978, at Richmond, Virginia.

_____
United States District Judge

_____
United States District Judge

_____
United States District Judge

FILED
OCT 10 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
AND
LAWRENCE W. I'ANSON,
IN HIS OFFICIAL CAPACITY
AS CHIEF JUSTICE OF THE SUPREME COURT OF VIRGINIA,
Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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In The

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October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
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LAWRENCE W. I'ANSON,
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Appellants,

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CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

---

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The "Motion to Dismiss or Affirm" fails to state any basis for this Court not to note jurisdiction and reverse the judgment of the District Court as requested in the Jurisdictional Statement.[1]

[1] The District Court found that the Chief Justice and the other defendants were immune from liability in their personal capacity for attorneys' fees. Accordingly, the style of the case has been amended to delete the reference to the chief justice of Virginia in his individual capacity.

I.

The Virginia Court Is Not Contesting On Appeal An Order It Proposed To The District Court

Upon remand, after the parties had negotiated an agreed version of the directory, Consumers Union submitted a proposed order enjoining enforcement insofar as the Rule would prohibit advertising as proposed in the directory, and declaring that the defendants had violated 42 U.S.C. § 1983. (App. A) The State defendants proposed an order (1) declaring the directory valid for publication, and (2) providing that defendants would be enjoined and restrained from enforcement of the rules and regulations "insofar as such regulations prohibit lawyers practicing in the Commonwealth of Virginia from providing such information to plaintiff for publication." (App. B) This proposed a limited ruling, found no violation of 42 U.S.C. § 1983, called for a limited injunction not significantly different from that sought in the complaint, and provided for no award of attorneys' fees. The District Court was exercising jurisdiction pursuant to 28 U.S.C. § 1343(3), under which a prevailing party is not entitled to an award of attorneys' fees.

If the District Court had entered the Order requested, the State defendants would have been satisfied to let this protracted litigation terminate. But that did not occur. Rather the District Court struck down the entire rule. Much of the rule was valid facially, such as the ban on false advertising. The District Court found that the defendants, including by implication the Virginia Court, had violated 42 USC § 1983 although no act of the court was cited as the basis for that finding. Relying on facts assumed but not in evidence, the District Court awarded attorneys' fees because of the Virginia Court's failure to amend the rule.

Neither party had requested a ruling that the rule was

unconstitutional on its face. This was significant to the defenses raised because Consumers Union's only complaint against the Court was that it had adopted the rule. Only if the rule was facially unconstitutional would there be a claim against the Court. *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), had made it clear that the rule was not facially unconstitutional.

As the District Court Opinion makes clear, the Virginia Court, [illegible] timely fashion prior to the District Court's decision, raised the issue of judicial immunity from an award of attorneys' fees under 42 U.S.C. § 1983. (Jurisdictional Statement, app. 5) However, the issue of the court's immunity from declaratory or injunctive relief under 42 U.S.C. § 1983 was presented to the District court on petition for rehearing.[2] Because the Virginia Court had no notice the District Court would attach relevance to the failure to amend the rule, the petition for rehearing was the earliest reasonable opportunity to raise the immunity issue. The issue was presented in a manner which permitted a proper ruling thereon. A party need not plead immunity as long as the issue is presented to the trial court in circumstances which enable the court to rule on it without prejudice to the other party. *Eslinger* v. *Thomas*, 476 F.2d 225, 228 (4th Cir. 1976).

That there is a legitimate need to define the scope of judicial immunity is reflected by the fact that the parties have cited conflicting cases from most of the circuits. Such an important jurisdictional issue can be raised by this Court *sua sponte*. *See Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 99 S.Ct. 1171 (1979) (legislative im-

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[2] No facts relevant to the issue of immunity from judgment on the merits or from an award of attorneys' fees were in dispute.

munity). Accordingly, this Court properly should consider the issue.

II.
There Were Proper Special Circumstances

Until the decision of the District Court, defendants were in the process of concluding a case which was left without meaningful issues by the decision of this Court in *Bates*. The Attorney General of Virginia had held the rule unenforceable insofar as it conflicted with *Bates,* and the Bar was formulating new advertising rules. None of the defendants had any intention of enforcing any rule contrary to *Bates*. And the record is devoid of any evidence to support a conclusion to the contrary. The only act by the Virginia Court adverse to Consumers Union had been adoption of an advertising ban which had been customary since 1908. (Jurisdictional Statement, App. 2, p. 39.)

Thus the reason the special circumstances doctrine is applicable to require denial of an award of attorneys' fees against the Virginia Court is not merely that it acted in good faith, but also it acted in accord with the law when it adopted a rule for protection of the public, never taking any other action adverse to the plaintiffs. If the District Court had applied only proper factors in examining whether special circumstances existed, there would have been no basis for an award of attorneys' fees against the Virginia Court.

III.
The Supreme Court of Virginia Is Not An Administrative Agency

Supervision of the legal profession is a part of the "primary governmental function of administering justice." *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). This

is an inherent judicial power which may be exercised absent statute. *Brown* v. *Supreme Court of Virginia,* 359 F.Supp. 549 (E.D. Va.), *aff'd.* 414 U.S. 1034 (1973).

In Virginia, the Virginia State Bar is established by law as the administrative agency of the Virginia Court. § 54-49, VA. CODE ANN.[3] The Virginia Court is authorized by statute to adopt rules and regulations governing the profession. § 54-48(b), VA. CODE ANN.[4]

Accordingly, the adoption of the rule at issue is a judicial function. If it is not, it is a legislative function delegated by the General Assembly, which entitles the Virginia Court to an equal degree of protection.

CONCLUSION

The judgment of the District Court should be reversed insofar as it applies to the Supreme Court of Virginia and the Chief Justice. The award of attorneys' fees against the Virginia Court should be reversed. The judgment of the District Court should be modified to declare the rule unconstitutional only insofar as it is applied in a manner contrary to *Bates*. In the alternative, the case should at least be remanded with instructions to the District Court to take

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[3] Section 54-49 provides:

> "The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating, and reporting the violation of such rules and regulations as are adopted by the Court under this article for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

[4] Section 54-48(b) authorizes the Supreme court to adopt regulations: "Prescribing a code of ethics governing the professional conduct of attorneys-at law including the practice of law. . . ."

evidence on the question whether there were facts to justify an award of fees against the Virginia Court.

Respectfully submitted,

THE SUPREME COURT OF VIRGINIA
and
THE HONORABLE LAWRENCE W. I'ANSON,
Appellants.

By: s/MARSHALL COLEMAN
Attorney General of Virginia

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CERTIFICATE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and counsel for the Virginia State Bar, *et al.*, hereby certify that three copies of this Appellants' Supplemental Response have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 9th day of October, 1979, as follows:

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amicus curiae

All parties required to be served have been served.

s/ MARSHALL COLEMAN
Attorney General of Virginia

APPENDIX

PROPOSED ORDER

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CONSUMERS UNION OF UNITED STATES, INC., et al.,

Plaintiffs,

v.

AMERICAN BAR ASSOCIATION,

Defendants.

Civil Action No. 75-0105-R

ORDER

On June 29, 1977, the U.S. Supreme Court vacated the judgment of this Court in the above-captioned case and remanded the case to this Court for further consideration in the light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). Having reconsidered this matter as ordered by the Supreme Court, Judges Bryan, Merhige and Warriner unanimously adopt and reconfirm the Court's previous order and findings in this case, except that portion of the Order and findings which prohibited the publication of information relating to prices charged by lawyers.

In light of the decision of the Supreme Court in *Bates, supra,* the Court finds that, pursuant to the First and Fourteenth Amendments, plaintiffs are entitled to gather and publish, and their members are entitled to receive, information on the fees at which lawyers will perform routine legal services and other fee information, so long as the information is not false, deceptive or misleading.

The Court having received the directory proposed to be published by plaintiffs finds that the proposed directory will not mislead the readers.

It is therefore now DECLARED THAT:

(1) Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility violates the First and Fourteenth Amendments of the U.S. Constitution and defendants Virginia State Bar and Virginia Supreme Court therefore have violated said Amendments and 42 U.S.C. Section 1983;

(2) Any provisions of the Virginia Code of Professional Responsibility that prohibits, or has a chilling effect upon, the gathering, publication, or receipt of a law list or directory because it contains the types of information about attorneys contained in plaintiffs' Memorandum in Support of Plaintiffs' Motion for Judgment on the Merits, is in violation of said Amendments and 42 U.S.C. Section 1983.

It therefore is now ORDERED AND ADJUDGED that:

(1)(a) the Virginia State Bar and the Virginia Supreme Court, their officers, successors in office, agents, servants, employees and attorneys are enjoined from directly or indirectly promulgating, interpreting, administering, maintaining, or enforcing against plaintiffs or others Disciplinary Rule 2-102 (A)(6) or any other provision of the Virginia Code of Professional Responsibility that prohibits, or has a chilling effect upon, the gathering, publication, or receipt of a law list on the ground that it contains the types of information about attorneys contained in plaintiffs' proposed revised directory.

(b) Defendant Virginia State Bar (1) within thirty (30) days of the date hereof shall issue to plaintiffs an official certificate stating that plaintiffs' proposed directory is in

compliance with all lawful provisions of the Virginia Code of Professional Responsibility, and (2) in its next official mailing to members of the Virginia State Bar shall include an official notice to the effect that Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility has been declared unconstitutional by this Court and that members of the Virginia State Bar may not be disciplined for being listed in plaintiffs' proposed directory, so long as the information furnished by them does not violate any lawful provisions of said Code.

Let the Clerk send copies of this Order to all counsel of record.

Done this .... day of ....., 1978, at Richmond, Virginia.

United States District Judge

United States District Judge

United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CONSUMERS UNION OF UNITED STATES, INC., *et al.*,

Plaintiffs,

v.

AMERICAN BAR ASSOCIATION, *et al.*,

Defendants.

Civil Action No. 75-0105-R

MEMORANDUM AND ORDER

On June 29, 1977, the U.S. Supreme Court vacated the judgment of this Court in the above-captioned case and remanded the case to this Court for further consideration in the light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). Having reconsidered this matter as ordered by the Supreme Court, Judges Bryan, Merhige and Warriner unanimously adopt and reconfirm the Court's previous order in this case, except insofar as that order did not permit publication by the plaintiffs of certain information as to the fees charged by members of the Bar of Virginia for services.

In light of the decision of the Supreme Court in *Bates, supra,* the Court holds that, pursuant to the First and Fourteenth Amendments, plaintiffs are entitled to gather and publish, and their members are entitled to receive, truthful information as to the fees at which lawyers will perform routine legal services, so long as the information

published is not false, misleading or deceptive. It is therefore now

ADJUDGED AND ORDERED that the prayers of the complaint, as amended, as to the State defendants, be and they are hereby granted; that accordingly the publication described in Appendix A to the affidavit of Mark Silbergeld, dated May 12, 1978, is approved by the Court, and hereby is declared to be valid for publication; and, to that extent, defendants, their successors in office, their agents and attorneys, be and they are hereby, permanently enjoined and restrained from enforcement of rules and regulations issued by defendants, insofar as such rules and regulations prohibit lawyers practicing in the Commonwealth of Virginia from providing such information to plaintiffs for publication.

Let the Clerk send copies of this Memorandum and Order to all counsel of record.

Done this .... day of ....., 1978, at Richmond, Virginia.

United States District Judge

United States District Judge

United States District Judge

Supreme Court, U. S.
FILED
NOV 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-198

SUPREME COURT OF VIRGINIA, ET AL.,
Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF ON BEHALF OF THE APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-198

SUPREME COURT OF VIRGINIA, ET AL.,
Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF ON BEHALF OF THE APPELLANTS

OPINIONS OF THE COURT BELOW

The Opinion of the District Court appears as an untitled attachment to the Order of the three-judge District Court declaring unconstitutional a portion of a certain rule of the Supreme Court of Virginia prohibiting advertising by attorneys and enjoining application of the rule to the appellees. The Order and the Opinion are reported *sub. nom.*

Consumers Union v. *Virginia State Bar*, 470 F.Supp. 1055 (E.D. Va. 1979). An earlier opinion in the same case is reported *sub. nom. Consumers Union* v. *American Bar Association*, 427 F.Supp. 506 (E.D. Va. 1976), *vacated and remanded* 433 U.S. 917 (1977).

JURISDICTION

This suit was brought by the appellees before a three-judge District Court pursuant to 28 U.S.C. § 2281 seeking an order declaring unconstitutional Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility, a regulation of statewide application. The order of the District Court granting the relief requested by the appellees was entered on May 8, 1979. Notice of appeal was filed by the Virginia Court on June 7, 1979. The jurisdiction of this Court to review this decision by appeal is conferred by 28 U.S.C. § 1253. Jurisdiction lies under 28 U.S.C. § 1253 because the action was filed prior to the repeal of 28 U.S.C. § 2281 on August 12, 1976 by Section 7 of P.L. 94-381. P.L. 94-381 now appears as a footnote to 28 U.S.C.A. § 2284 and provides that the repeal does not apply to actions filed prior to the effective date of the Act. Probable jurisdiction was noted on October 15, 1979.

QUESTIONS PRESENTED

1. Is the Supreme Court of Virginia immune from judgment under the doctrine of judicial immunity?
2. May the Civil Rights Attorney's Fees Awards Act of 1976 be construed to permit an award of attorneys' fees against the Supreme Court of Virginia for its judicial acts?
3. Is the Supreme Court of Virginia immune from judgment under the doctrine of legislative immunity?
4. Does the doctrine of judicial immunity preclude the award of attorneys' fees for failure to correct a challenged judicial act which is the subject of litigation?
5. On the facts before it, did the District Court abuse its discretion in awarding fees against the Virginia Court?

RULE INVOLVED

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in a dignified form:

* * *

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-105(A)(4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; mili-

tary service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.

STATUTE INVOLVED

Section 42 U.S.C. § 1988, 90 Stat. 2641 provides

> "... In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public law 92-318, or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

On February 27, 1975, the appellees filed a complaint pursuant to 42 U.S.C. § 1343(3) and 42 U.S.C. § 1983 requesting the convening of a three-judge court to declare unconstitutional on its face DR-2 102(A)(6) of the Virginia Code of Professional Responsibility and to enjoin the Virginia State Bar, the American Bar Association, the Supreme Court of Virginia, and others, from prohibiting the publication of an advertising directory. The case was tried on May 17, 1976, prior to passage of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The District Court entered an order on December 17, 1976,

granting partial relief in three separate opinions. Both parties appealed and this Court vacated and remanded for further consideration in light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). *Consumers Union* v. *American Bar Association,* 433 U.S. 917 (1977).

Upon remand, defendants stipulated that they had no objection to publication of the advertising directory. (Response to Motion for Judgment on the Merits, June 12, 1978.) In July of 1978, the District Court heard oral argument on the issue of attorneys' fees. On May 8, 1979, the District Court entered its Order awarding attorneys' fees under 42 U.S.C. § 1988 as well as declaratory and injunctive relief against the Supreme Court of Virginia. The District Court found jurisdiction under 28 U.S.C. § 1343(3). 470 F.Supp. at 1058.

The District Court apparently based its award of attorneys' fees solely on the fact that in 1976, before this Court's decision in *Bates,* the Supreme Court of Virginia had rejected a proposed revision of the rule in question and upon the conclusion, unsupported by any evidence, that the Court had been derelict in not amending the rule, then or thereafter while the case was pending. In its opinion, the District Court formally announced for the first time that "in the interest of comity," it had "delayed" its decision in order to afford the Supreme Court of Virginia an opportunity to amend its rule. The District Court summarily rejected (Order, May 30, 1979) the Virginia Court's motion for rehearing and petition for leave to present evidence concerning the ongoing efforts of the Virginia State Bar and the Supreme Court of Virginia to formulate a constitutional rule. ("Representation of Testimony to be Offered," filed May 22, 1979; Petition for Rehearing, filed May 22, 1979). The Virginia Court proferred testimony that in 1976 it had declined to adopt the ABA's hastily adopted modifica-

tion of DR 2-102 because it needed further study and because Consumer's Union had advised that adoption of that version would not resolve the litigation.

SUMMARY OF ARGUMENT

The award of declaratory and injunctive relief in this case was prohibited by the doctrine of absolute judicial immunity. Accordingly, the award of attorneys' fees was improper.

Where the basis for jurisdiction is a challenge to a discretionary judicial act, judicial immunity is grounded in the separation of powers and is absolute. This immunity is of a higher order than immunities which originate in doctrines of comity or federalism or are conditioned upon "good faith."

Even if it is assumed that judicial immunity is only a creature of the common law which may be repealed by Congress, there is nothing in the language or legislative history of the Civil Rights Attorney's Fees Award Act of 1976 which repeals this immunity.

Judicial immunity is coextensive with legislative immunity. Whether adoption of the rule be classified as a judicial act or a legislative act, the act is entitled to absolute immunity and is a defense to an award of attorneys' fees.

Alternatively, the three-judge court abused its discretion in awarding attorneys' fees for post-trial lawful acts of a party. It erroneously assumed that the challenged rule governing the professional responsibility of attorneys was invalid on its face (rather than as applied), and that a facially valid rule had to be adopted. The three-judge court had no facts before it from which it could have inferred an improper motive from the failure to correct the challenged act.

ARGUMENT

I.

The Supreme Court Of Virginia Is Immune From Judgment Under The Doctrine Of Judicial Immunity

The Virginia Court was immune from suit for declaratory or injunctive relief. While the Virginia Court had promulgated the contested rule, it had taken no other action adverse to the rights claimed by Consumers Union. The Virginia Court was neither a necessary nor a proper party to the action since a declaration of the rule's invalidity or an injunction against its enforcement would not invoke or require any judgment against the Virginia Court. Accordingly, it was inappropriate to award attorneys' fees against the Virginia Court. At issue is the liability of a court for a judicial act. The only basis for jurisdiction over the Supreme Court of Virginia was that it adopted a rule later determined to be unconstitutional in part. The District Court determined this to be a judicial act within the Court's jurisdiction. 470 F.Supp. at 1059. This is no different from a legislative enactment of a law which is later determined to be invalid; immunity from liability in both cases is absolute.[1]

If Congress can require a court to defend its judicial acts against a potential award of attorneys' fees for punitive purposes, it can require any court, state or federal, to defend itself against an award of damages or imposition of criminal

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[1] The instant facts are materially different from the situation in *Hutto* v. *Finney*, 437 U.S. 678 (1978), wherein this Court held that an award of attorneys' fees could be made against a state agency when the agency was not a party. In *Hutto*, individual state employees were parties, and the fee award was made against the agency by which they were employed. In the present case the Court found that on the facts before it plaintiffs were not entitled to recover fees of the other defendants or the agency by whom they were employed. 470 F. Supp. at 1063.

sanction for the same acts. Since under *Davis* v. *Passman,* 99 S.Ct 2264 (1979), causes of action may arise directly under the constitution, the issues raised here are as relevant to issues of federal judicial immunity as to state judicial immunity. This would do unconscionable violence to our framework of government.

This immunity is of a high order. It is a common law rule which prior decisions have construed to be of constitutional origin. The immunity derives from the principles of separation of powers embodied in both the "guarantee clause" of Art. IV § 4 of the Constitution and the Tenth Amendment.

The Framers believed in an independent judiciary as an indispensable element of a republican form of government. Alexander Hamilton wrote that "there is no liberty if the power of judging be not separated from the legislative and executive powers. Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments. . . . The complete independence of the courts of justice is peculiarly essential in a limited constitution." The Federalist, No. 78 at 227-28 (2d Ed. R. Fairfield, 1966).

Abrogation of this immunity would be in derogation of an essential component of a republican form of government. To override an essential state function in derogation of a state's Tenth Amendment rights, Congress must have express authority. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976). Absolute immunity is thus significantly different from the various abstention and sovereign immunity doctrines set forth in such decisions as *Younger* v. *Harris,* 401 U.S. 37 (1971), and *Edelman* v. *Jordan,* 415 U.S. 651 (1974). Those principles are founded upon considerations of "equity, comity, and federalism which do not have constitutional origin." Those decisions do not prohibit attacks

on the facial constitutionality of state policy.[2] Similarly, absolute immunity is different from that involved in coercive civil process in aid of a court's jurisdiction, *e.g.,* writs of mandamus and similar writs. *See Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821); *Ex parte Bradley,* 74 U.S. (7 Wall.) 364 (1868). None of the foregoing constitute a fundamental state function, such as the exercise of discretionary judicial authority, which is constitutionally protected from encroachment by other branches of government.

As early as the reign of Richard III, the English common law accorded absolute immunity to judges for acts committed within their judicial capacity. 6 W. Holdsworth, *A Heritage of English Law* 235 (1927). *Floyd* v. *Barker,* 12 Coke Rep. 23, 77 Eng. Rep. 1305 (1607). This immunity was adopted in this country in *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335 (1871),[3] wherein the defendant had stricken from the rolls of the court the name of an attorney for defending one of the conspirators in the Lincoln assassination.

In deciding *Tenny* v. *Brandhove,* 341 U.S. 367 (1951), this Court assumed for purposes of argument that Congress could repeal legislative immunity in order to reach the statutory question upon which the case was decided. The Court then concluded that Congress had not intended to repeal this immunity and that the immunity extended to state legislators as well as to Congressmen.

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[2] *Steffel* v. *Thompson,* 415 U.S. 452 (1974); *Theard* v. *United States,* 354 U.S. 278 (1957); *Fairmont Creamery* v. *Minnesota,* 275 U.S. 70 (1927).

[3] The rationale of *Bradley* was adopted in Virginia in *Johnston* v. *Moorman,* 80 Va. (5 Hans.) 131, 139-140 (1885), which noted that the immunity exists to assure the public that "the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* at 140, quoting *Scott* v. *Stansfield,* 3 Law Rep. Exchequer, 220 (1868).

Legislative immunity under the "Speech or Debate Clause" of Article I § 6, cl. 1 of the Constitution provides members of Congress absolute immunity "not only from the consequences of litigation's results, but also from the burden of defending themselves." *Davis* v. *Passman,* 99 S.Ct. 2264, 2271 (1979); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967). Immunity under the "Speech or Debate Clause" was extended to state legislators, who are immune from all civil process for their legislative acts under *Tenny* v. *Brandhove, supra. See Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973). Similarly, judicial immunity is "equally established" as a defense to an action under 42 U.S.C. § 1983. *Pierson* v. *Ray,* 386 U.S. 547, 554-555, n. 9 (1967), citing *Bauers* v. *Heisel,* 361 F.2d 581 (3d Cir. 1966). *Bauers* recognized that Congressional abrogation of judicial immunity would constitute a legislative invasion of the judicial domain, in violation of the constitutional guarantee of a republican form of government. As noted in the "Brief Amicus Curiae On Behalf of the Conference of Chief Justices in Support of the Jurisdictional Statement," at p. 15, "The constitutional doctrine of separation of powers would seem to preclude legislative incursion on the independence of the judiciary by this means."

This Court in *Stump* v. *Sparkman,* 435 U.S. 349 (1978), recently reiterated the validity of the doctrine of absolute judicial immunity in a case where the facts pushed the doctrine to its limits. In doing so, the Court announced, *id.* at 355-56:

> "The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.' *Bradley* v. *Fisher,* [13 Wall. 335 (1872)], at 347. For that reason the Court held that 'judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.' 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle."

Although *Bradley, Pierson,* and *Stump* specifically involved only suits for damages, none of the decisions limited the immunity to damage awards. In *Pierson,* judicial immunity was interpreted to protect against liability in all civil actions which, under 42 U.S.C. § 1983, includes "an action at law, suit in equity, or other proper proceedings for redress." 386 U.S. at 554.

This Court has not decided whether the phrase "all civil actions" means only actions for damages.[4] Most authorities considering the point have concluded that judicial immunity extends at least to all actions challenging a discretionary judicial act.[5] This Court has never condoned any concept that equity suits against judges were allowed under 42 U.S.C. § 1983. Most lower court decisions to the contrary are distinguishable.[6]

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[4] *Falkner* v. *Blanton,* 488 F. 2d 551 (5th Cir. 1974), *aff'd,* 419 U.S. 1080, *rehearing denied,* 419 U.S. 977 (Douglas, J., dissenting). The scope of the immunity was presented to the Court in *Littleton* v. *Berbling,* 468 F. 2d 389 (7th Cir. 1972), *rev'd on other grounds sub. nom. O'Shea* v. *Littleton,* 414 U.S. 488 (1974).

[5] *Mirvin* v. *Justices of the Supreme Court of Nevada,* 415 F. Supp. 1178, 1192 (D. Nev. 1976); *Mackay* v. *Nesbett,* 285 F. Supp. 498, *aff'd,* 412 F. 2d 846 (9th Cir. 1969), *cert. denied,* 396 U.S. 960, 397 U.S. 1004; *Gay* v. *Heller,* 252 F. 2d 313 (5th Cir. 1958); *Peckham* v. *Scanlon,* 241 F. 2d 761 (7th Cir. 1957); *Tate* v.

In fact, the rationale for immunity from money damages is equally applicable to actions for declaratory and injunctive relief. Judicial immunity exists because of the special nature of the responsibilities of judges; absolute immunity is necessary to assure that judges can perform their respective functions without harassment. *Butz* v. *Economou,* 438 U.S. 478 (1978).

The need for this immunity is seen in the instant case: The Supreme Court of Virginia in 1970 adopted a disciplinary rule barring advertising by attorneys. The rule had been adopted by the American Bar Association in 1969. At the time, the approval by this court of similar rules applicable to other professions made the law seem settled.[7]

Arnold, 223 F. 2d 782 (8th Cir. 1955); *Adkins* v. *Underwood,* 370 F. Supp. 510, *aff'd,* 520 F. 2d 890, *cert. denied,* 423 U.S. 1017; *Brown* v. *Dunne,* 409 F. 2d 341 (7th Cir. 1969); *Cheramie* v. *Tucker,* 493 F. 2d 586 (5th Cir. 1974); *Wood* v. *Circuit Court of Warren County,* 331 F. Supp. 1245 (E.D. Tenn. 1971) (A court is not an entity which may be sued.)

But see White v. *Crowell,* 434 F. Supp. 1119 (W.D. Tenn. 1977) (*per curiam*); *United States* v. *McLeod,* 385 F. 2d 734 (5th Cir. 1967); *Erdmann* v. *Stevens,* 458 F. 2d 1205 (2d Cir. 1972).

[6] Some are district court decisions which were affirmed or reversed on other grounds. *See, e.g., Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* 299 F. Supp. 117 (S.D.N.Y. 969), *rev'd* 401 U.S. 154 (1971); *Rakes* v. *Coleman,* 318 F. Supp. 181 (E.D. Va. 1970); *Fowler* v. *Alexander,* 478 F. 2d 694 (4th Cir. 1973); *Boddie* v. *Connecticut,* 286 F. Supp. 968 (D. Conn. 1968), *rev'd,* 401 U.S. 371 (1970). Others are cases involving a lawless disregard of established civil rights by county judges. *See, e.g., United States* v. *Clark,* 249 F. Supp. 720 (S.D. Ala. 1965); *Bramlett* v. *Peterson,* 307 F. Supp. 1311 (M.D. Fla. 1969); *Phillips* v. *Cole,* 298 F. Supp. 1049 (N.D. Minn. 1968); *United States* v. *McLeod,* 385 F. 2d 734 (5th Cir. 1967). In these cases, the judges were all acting in flagrant disregard of their jurisdiction. *Stump* v. *Sparkman, supra,* would extend immunity from damages in such cases, but this case does not involve acts in disregard of settled rights.

[7] *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 611-13 (1935); *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963); *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955).

The 5-4 decision of this court in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), rendered the rule unenforceable on the facts of that case. *Bates* specifically upheld regulation of attorney advertising as to matters which were false, misleading or deceptive and left the door open to barring advertisement of undefined services not of a routine nature. Under the *Bates* decision, these plaintiffs have prevailed as to their right to publish information on fees charged and have requested a sum in excess of $121,000 in attorneys' fees.

The effect of *Bates* was to hold rules similar to Virginia's invalid only insofar as they conflicted with *Bates.* 433 U.S. at 383-84. The District Court seems to have concluded that *Bates* rendered the Virginia rule "overbroad" and unenforceable in its entirety. 470 F.Supp. at 1058.

To expose the considered judgments of a court to liability for monetary awards, even in the guise of attorneys' fees, and to subject the members of the tribunal to the jurisdiction of another court can have no effect other than to compel decisions on the basis of expediency. Introducing considerations extraneous to the law will be detrimental to the judicial process. Such a situation is precisely the reason for judicial immunity from judgment of any kind.

II.

42 U.S.C. § 1988 Should Not Be Construed To Permit An Award Of Attorneys' Fees Against The Supreme Court Of Virginia For Its Judicial Acts

Proper construction of the Civil Rights Attorneys' Fees Awards Act shows that the District Court erred in construing the act to abrogate judicial immunity from the award of fees. *Hutto* v. *Finney, supra,* 437 U.S. at 700 (Brennan, J. concurring) found a congressional intent to award fees against States in a proper case. The District

Court, however, interpreted a footnote in a House Report as rendering *Pierson* v. *Ray* immunity inapplicable to bar attorneys' fees awards and therefore extended the holding in *Hutto* to abrogate judicial immunity.[8] Indeed the Senate Report noted that, "The bill created no startling new remedy. . . ." S.Rep. No. 94-1011, 94th Cong., 2d Sess. 7 (1976). It was the Senate's bill which ultimately was adopted.

Appellants do not question that a judge who acted under color of law but outside his jurisdiction would be subject to judgment under 42 U.S.C. § 1983 and hence subject to the fee awards in spite of his good faith immunity. However, where the court has acted only within its jurisdiction and is absolutely immune, there is nothing in the wording of the statute or the legislative history to imply a congressional intent to abrogate that immunity. Fees are only awarded against a proper party. Just as *Pierson* v. *Ray, supra,* concluded that enactment of 42 U.S.C. § 1983 did not abrogate judicial immunity, so is there likewise no reason to infer that 42 U.S.C. § 1988 abrogated the immunity from the award of attorneys' fees.

As Justice Powell noted in his dissent in *Hutto*:

> "But in this sensitive area of conflicting interests of constitutional dimension, we should not permit items of legislative history to substitute for explicit statutory language. *SEC* v. *Sloan,* 436 U.S. 103, 121 (1978). The court should be hesitant to presume general congressional awareness of Eleventh Amendment consequences of a statute that does not make express provision for monetary recovery against the States. *Id.* at 706.

[8] (470 F. Supp. at 1060-61.) The footnote merely included *Pierson* v. *Ray, supra,* among a listing of cases discussing various immunities. There is no reason for this Court to construe that footnote as doing anything more than allowing fees for those acts answerable to suit under so-called "good faith immunity."

Because of the potential impact of attorneys' fees awards on the judiciary, this Court should adopt Justice Powell's logic on the facts of this case, and decline to infer a legislative intent from an ambiguous footnote in a legislative report. Where, as here, the only basis for jurisdiction is a judicial act, then a clear expression of legislative intent is required.

Congress enacted 42 U.S.C. § 1988 with the knowledge that *Pierson* v. *Ray, supra,* and *Tenny* v. *Brandhove, supra,* required an express repeal of judicial and legislative immunity. An oblique reference in a committee report does not satisfy the requirement of these precedents.

The District Court erred in assuming judicial immunity was a creature of common law which can be repealed by implication by an act of Congress. That argument was rejected by this Court in *Tenny* v. *Brandhove, supra,* wherein the issue was framed as:

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Government here? 341 U.S. at 376?"

The Court answers its prophetic question:

> "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."
>
> * * *
>
> "[H]ere the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and *** the statute of 1871 does not create civil liability for such conduct." *Id.* at 379.

Similar logic applies to judicial immunity. It is vital that

courts be free to exercise their discretion without threat of an award of attorneys' fees which could seriously impair the functioning of the court. In this sense the award of fees against the court may be more debilitating to the judicial process than an award of damages against a judge individually.

III.

The Supreme Court Of Virginia Is Immune From The Award Of Attorneys' Fees Under The Doctrine Of Legislative Immunity

It is urged that the Court rule that judicial and legislative immunity extend similar protections to legislatures and courts equally. The facts of this case entitle the Virginia court to immunity under both doctrines. For the Virginia Supreme Court in promulgating rules of procedure and conduct was acting in its legislative mode. Under *Butz* v. *Economou,* 438 U.S. 478 (1978), it is the nature of the act performed rather than the title of the official that determines whether immunity is afforded.

That legislative immunity is absolute cannot be disputed. *See Gravel* v. *United States,* 408 U.S. 606 (1972); *Brewster* v. *United States,* 408 U.S. 501 (1972). *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975), notes, "We reaffirm that once it is determined that members are acting within the 'legitimate legislative sphere' the speech and debate clause is an absolute bar to interference." In *Dombrowski* v. *Eastland,* 387 U.S. 82, 84-85 (1967), this Court noted that legislators were immune from "the burden of defending themselves."

IV.

The Doctrine Of Judicial Immunity Precludes An Award Of Attorneys' Fees As A Penal Measure

The circumstances in which the award of attorneys' fees

was made against the Virginia Court show that the purpose was not so much to award costs to the prevailing party as to punish the Virginia Court for lawful post-*Bates* conduct with which the District Court merely disagreed. To protect the judiciary from this sort of intrusion is precisely the reason for immunity from damages.

The injury to the independence of the State judiciary by the decision of the District Court is underscored by the fact that the award of fees was based on a conclusion unsupported by evidence and without any prior order directing amendment of the rule. In its Opinion, the District Court formally announced for the first time that it had delayed its decision to afford the Supreme Court of Virginia an opportunity to amend its rule. 470 F.Supp. at 1063.

If the policy of protecting the independence of the judiciary means anything, it must afford protection from the abuses inherent in allowing one tribunal to award a potentially punitive sum against another. The award was made for punitive reasons and therefore is not different from an award of damages or a contempt citation against the Virginia Court. That such an award may be based upon facts not in evidence and without affording an opportunity to show the real facts is even more illustrative of the threat to the independence of the judiciary.

V.

Even Assuming That Fees May Be Awarded Against A Court For A Judicial Act, The District Court Abused Its Discretion In Awarding Fees

The District Court's opinion did not assign as a basis for awarding fees against the Virginia Court the fact that the Court had adopted in 1970 the ABA Rule prohibiting advertising by attorneys. The District Court did not find that any law or lawful process of that Court imposed an obligation to amend the rule. The District Court simply assumed

without any basis in fact that the Virginia Court was in some way being obstructive. The District Court refused the Virginia Court's petition to be allowed to present evidence on the extensive ongoing State activity to revamp advertising and solicitation rules. The result of denying the petition for rehearing was to force the Virginia Court into an appeal without the opportunity to show its unquestioned good faith.[9]

a.

THERE WAS NO OBLIGATION UPON THE SUPREME COURT OF VIRGINIA TO CORRECT A PRIOR JUDICIAL ACT WHICH WAS STILL IN LITIGATION

The District Court's concern arose from the fact that in holding the Virginia rule unconstitutional on its face it erroneously believed the rule to be wholly void for overbreadth, thus arguably requiring amendment of the rule. The original decision of the District Court had been based on an application of the overbreadth doctrine. 427 F.Supp. at 519. In fact, the rule is enforceable as long as it is applied in a manner consistent with *Bates*. 433 U.S. at 383-84. As the petition for rehearing alleged and as the Virginia Court was prepared to show, after *Bates,* the Virginia Court was following its established procedure of not amending a disciplinary rule of court without receiving recommendations on the subject from the state administrative agency, the Virginia State Bar, through which the court regulates

[9] The Virginia Court's petition for rehearing to put on evidence on the matters of concern to the three-judge court was denied without an opinion. (Order May 30, 1979.) The District Court Opinion avoids determination of the serious immunity issues by invoking the sentiment expressed in *Hutto* v. *Finney, supra,* 437 U.S. at 691, that an award of fees against a defendant acting in bad faith was tantamount to a fine for contempt and "vindicated the District Court's authority over a recalcitrant litigant." This simply overlooks the fact that *Hutto* involved the refusal to comply with a judgment and that bad faith was found as a fact after a hearing.

the practice of law in Virginia. The Virginia State Bar was acting to draft such amendments (see "Petition for Rehearing," May 22, 1979). In the meantime,, by not acting *sua sponte* to amend the rule, Virginia was lawfully applying the old rule only to the extent allowed by *Bates,* thus violating no principal of law or any directive of the District Court.[10]

b.

THE DISTRICT COURT HAD NO FACTS BEFORE IT TO SUGGEST THAT THE RULE SHOULD BE CHANGED

The District Court failed to consider that the Attorney General of Virginia had ruled, in an opinion disseminated by the Virginia State Bar to its members, that the Virginia rule would not be enforced except to the extent that enforcement was allowed under *Bates.*[11]

Had the Virginia Court adopted the rule proposed to it by the Virginia State Bar in 1976, the rule still would have prohibited the advertising of fees. Since Consumers Union appealed the ruling of the District Court that such a ban on advertising was proper, it is self-evident that adoption of the 1976 rule would not have terminated the litigation at that stage.

[10] The Virginia State Bar has now completed its work, and acting upon its recommendations, the Virginia Court has adopted, effective January 1, 1980, a rule permitting any advertising that is not false, misleading, or deceptive. Accordingly the issue of the unconstitutionality of the former Virginia Rule is now moot and declaratory relief is inappropriate. *See Preiser* v, *Newkirk,* 422 U.S. 395 (1975).

[11] A copy of the Attorney General's Opinion had been attached as part of Defendants' "Response to Plaintiff's Motion for Expedited Consideration," December 28, 1978, in which it was argued that none of the defendants had taken any action to enforce the Virginia rule in a manner contrary to *Bates.* In that pleading it was noted that the Attorney General had taken the extraordinary step of intervening on the side of the defense in a criminal prosecution brought under the Virginia *statute* prohibiting advertising by attorneys. The Attorney General argued that the indictment was for acts allowable under *Bates.* The indictment was dismissed.

Nor was Consumers Union prejudiced in any way by the post-*Bates* failure to amend the Rule. The Bar had stipulated the right of Consumers Union to publish its directory. But the Bar and the Court were left with the complex task of determining an entire regulatory program for lawyer advertising. Issues far broader than those of the instant case had yet to be resolved.

Furthermore, the District Court was unaware, because of its post-decision refusal to hear evidence on the issue, that the delay in adopting a new rule was the result of extensive activities by the Bar to recommend new advertising *and* solicitation rules which exceeded minimal constitutional requirements. The District Court failed to recognize that *Bates* left a number of serious questions unresolved. Indeed, if any point is clear at the present time it is that there is no concensus as to the extent to which lawyer advertising can be regulated. Eight states[12] have adopted the ABA Model Code in an essentially unaltered form. Eighteen states have adopted modified versions of the ABA Code.[13] Twelve states, including Virginia and the District of Columbia, have adopted permissive rules.[14] Six states retain restrictive policies.[15] And six have not changed their rule since Bates.[16]

[12] Arizona Supreme Court Rule 29(a) (Supp. 1979); Arkansas, 263 Ark. 948 (1978); Colorado, C.P.R., c. 2; Nebraska, C.P.R., c. 2 (amend. 1979); Nevada, Sup. Ct. R. 164 (1979); Gen. Stat. of North Carolina, App. VII, Canon 27; Washington, C.P.R., c. 2 (January 1979); West Virginia, C.P.R., c. 2.

[13] Alabama, C.P.R., c. 2; Alaska; Connecticut, C.P.R., c. 2; Delaware, C.P.R., c. 2; Florida Sup. Ct. Rules 54.925, 55.263; Georgia, Code Ann., Title 9 App. DR 2-101 (Supp. 1979); Indiana, C.P.R,, c. 2; Iowa, C.P.R., c. 2; Kansas, R. for Discipline of Attys., 225; Missouri, Sup. Ct. R. 4 (Supp. 1979); New Mexico, C.P.R., c. 2; New Jersey; Ohio, C.P.R., c. 2 (Page Supp. 1979); Oklahoma, Stat. Ann., Title 15, Ch. 1, App. 3; Oregon; Tennessee, Code Ann., R. of Sup. Ct, Appen. C.P.R.; Utah, R. Conduct, c. 2; Wyoming, 13 Land and Water Review 1978.

There was no legal or factual basis for criticizing the conduct of the Virginia Supreme Court, which had no knowledge that the District Court was awaiting amendment of the rule. Accordingly, to award fees for post-*Bates* lawful acts of a party is the most extreme abuse of discretion. Further, by denying the Virginia Court's petition for rehearing, the abuse of discretion was only compounded.

[14] California, Sup. Ct. Order in Bar Misc. 3922; District of Columbia, D.C. Ct. App. R. 10, App. A; Idaho, C.P.R, c. 2; Kentucky, Sup. Ct. R. 3-135 (July 1979); Maine, Bar R., 3.9 (May 1979); Maryland, Rules of Practice, App. F. (Supp. 1979); Massachusetts, 1979 Mass. Legis. Serv., S.J.C. R. 3:22; Michigan, Sup. Ct. Admin. Order, 1978-4 (November 13, 1979); Minnesota, C.P.R., c. 2 (West Supp. 1979); New York Jud. Law App. C.P.R., c. 2 (McKinney Supp. 1979-80); Pennsylvania, Ct. R., C.P.R., c. 2 (Purdon Supp. 1979); Virginia, Order of October 3, 1979; Wisconsin.

[15] Louisiana, Rev. Stat. Ann., Tit. 37, Ch. 4; Mississippi, Sup. Ct. Misc. Order No. 816 (September 19, 1979); New Hampshire, 4 N.H.L.W. 14A; Rhode Island, R. Ct. 47; Texas Stat. Ann. Tit. 14, App. Art. 12, § 8; Vermont, Stat. Ann. Tit. 12, App. IX, c. 2.

[16] Hawaii, Illinois, Montana, North Dakota, South Carolina, South Dakota.

CONCLUSION

The judgment of the District Court should be reversed insofar as it enjoins the Supreme Court of Virginia and the Chief Justice from enforcing the rule. The award of attorneys' fees against the Virginia Court should be reversed. The judgment of the District Court should be modified to enjoin the Virginia State Bar from enforcing the rule to the extent that it might be applied in a manner contrary to *Bates*. In the alternative, the case should at least be remanded with instructions to the District Court to take evidence on the question whether there were facts to justify an award of fees against the Virginia Court.

Respectfully submitted,

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and
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I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, and counsel for the Supreme Court of Virginia and the Chief Justice, hereby certify that three copies of this Jurisdictional Statement have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 29th day of November, 1979, as follows:

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FILED
JAN 8 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA, *et al.*,
Appellants,

v.

CONSUMERS UNION OF UNITED STATES, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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In The
Supreme Court of the United States
October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA, *et al.*,
Appellants,
v.
CONSUMERS UNION OF UNITED STATES, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE APPELLEES

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutory provision and rule set forth by appellants, the Fourteenth Amendment and 42 U.S.C. § 1983 are directly relevant to this case. Insofar as they are pertinent, they are here set forth:

The Fourteenth Amendment provides:

> Section 1 . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTIONS PRESENTED

1. Do the common law doctrines of judicial and legislative immunity shield state judges from suits brought under 42 U.S.C. § 1983 for declaratory and injunctive relief from an unconstitutional attorney disciplinary rule?

2. Was the Three-Judge District Court correct in following this Court's holding in *Hutto* v. *Finney*, 437 U.S. 678 (1978) and awarding attorneys' fees and costs under the Civil Rights Attorney's Fees Awards Act against state judicial officers, in their official capacity, to be paid from state funds, where no special circumstances rendered such an award unjust?

STATEMENT OF THE CASE

In 1974, Consumers Union of United States, Inc.[1] and the Virginia Citizens Consumer Council[2] (hereinafter referred to collectively as the "consumer groups") sought to publish an attorney directory for Arlington County, Virginia. Studies had documented that an enormous number of consumers with legal problems did not seek the advice of attorneys because unfamiliar with available legal services.[3] To educate and assist their members and other consumers in obtaining legal counsel, the consumer groups attempted to publish a model attorney directory for Arlington County. The directory was to contain such information as attorneys' areas of practice, legal fees and fluency in foreign languages. That model was to be made available at cost to citizen groups and bar associations that wished to compile similar directories for other localities.[4]

However, the consumer groups were precluded from gathering any information for the directory because of

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[1]Consumers Union of United States, Inc. is a New York not-for-profit corporation chartered in 1936 to provide information, education and counsel about consumer goods and services and the management of the family income. It publishes *Consumer Reports*, a monthly magazine with a circulation of over 2 million, which regularly carries articles on its own product testing, professional services, product safety, marketplace economics, and legislative, judicial and regulatory actions that affect consumers. Consumers Union's publications carry no advertising and receive no commercial support. Consumers Union represents the interests of its members through testimony before Congress and executive agencies and through litigation in the courts.

[2]Virginia Citizens Consumer Council is a nonprofit, statewide consumer organization chartered by the State of Virginia in 1967 to educate and to promote the rights of its members.

[3]See *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 376 (1977).

[4]In fact, the D.C. Bar Association has published a directory based on the consumer groups' model.

Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility ("Rule"). That Rule permitted attorneys to participate only in directories that contained very limited types of information. Because the consumer groups' directory was to include additional factual information, lawyers who participated in the directory would be engaging in conduct deemed unethical by the Rule, and subject to disciplinary action, including disbarment, by the Virginia Supreme Court ("Virginia Court" or "Court").[5]

In order to protect their First Amendment rights and the First Amendment rights of their members and the public to receive, gather and publish truthful factual information on available professional legal services, the consumer groups commenced this action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia in February of 1975. Their complaint sought a declaration that the Virginia Court and Virginia Bar Association ("Bar") had infringed on these rights and an injunction enjoining their enforcement of the Rule (App. 20).[6] A Three-Judge District Court was convened on April 14, 1975.

On June 16, 1975, while this case was pending, the Supreme Court established, in *Bigelow* v. *Virginia,* 421, U.S. 809 (1975), that commercial speech enjoys a measure of First Amendment protection. In response to that decision, the Bar submitted to the Virginia Court a proposed amendment to the Rule.

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[5]The Chief Justice and other justices of the Virginia Supreme Court are referred to in this brief as the "Virginia Supreme Court", "Virginia Court" or "Court".

[6]Throughout this brief, references to "App." refer to the Appendix filed with the Court. References to "J.S." refer to the Jurisdictional Statement.

The Virginia Court rejected that amendment on April 20, 1976, stating only that this change would "not serve the best interests of the public or legal profession." (App. 34). Although the Virginia Court has authority to amend its disciplinary rules on its own initiative (Va. Code § 54-48) it took no action to bring its contested Rule into compliance with the Supreme Court's ruling. When the Supreme Court, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), held that consumers enjoy a First Amendment right to receive price information on drugs, the Virginia Court again failed to amend its Rule to comport with First Amendment freedoms.

On December 17, 1976, the District Court held the Rule to be unconstitutional, except insofar as it prohibited publication of fees other than an initial consultation fee. 427 F.Supp. 506 (E.D.Va. 1976). The Virginia Court and Bar appealed to this Court the District Court's decision partially invalidating the Rule. The consumer groups appealed from the decision upholding the ban on the publication of most fee information.

While those appeals were pending, this Court decided *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), holding that the First Amendment protects the advertising of information on fees for routine legal services. Two days after that decision, this Court vacated the District Court decision in this case and remanded for a decision consistent with *Bates.*

The consumer groups, on May 15, 1978, moved in the District Court for a judgment on the merits, a permanent injunction and an order declaring defendants' liability for fees and costs. Contrary to its position now,

the Virginia Court then conceded that declaratory and injunctive relief should be granted against the Court, and submitted a proposed Order providing for such relief (App. 35). However, the Court did oppose the motion for a fee and cost award.

On May 8, 1979, the District Court declared that the entire directory is constitutionally protected and that the Rule is unconstitutional on its face. The District Court enjoined the Virginia Court and Bar from enforcing the Rule and determined that the consumer groups are entitled to reimbursement for their attorneys fees and costs under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Rather than award fees and costs against the Bar, to be paid from members' dues, the District Court awarded fees and costs only against the Virginia Court, to be paid from the State's funds. In doing so, the District Court followed this Court's holding in *Hutto* v. *Finney, supra,* 437 U.S. at 699 n.32 that good faith is not a defense to the award of attorney's fees under the Act and further found that no special circumstances existed which would render such an award unjust.

The Virginia Court appealed from the District Court's grant of declaratory and injunctive relief and from the award of fees and costs. Although this suit had been commenced in February of 1975, it was not until after the District Court's decision awarding fees and costs, over four years later, that the Virginia Court claimed judicial immunity as a defense to the claim for injunctive and declaratory relief. Its claim to legislative immunity is even more of an afterthought, being raised only in the brief on the merits filed herein by the Virginia Court.

The consumer groups appealed the District Court's decision not to enter a fee award against the Bar. Probable jurisdiction was noted over the Virginia Court's appeal on October 15, 1979. No action has been taken on the consumer groups' appeal.

SUMMARY OF ARGUMENT

Neither judicial nor legislative immunity shield the Virginia Court from suit under 42 U.S.C. § 1983 for prospective declaratory and injunctive relief. To extend these common law immunity doctrines to this case is unwarranted, unprecedented and unsupported by public policy. Such a decision, in conjunction with this Court's decision that civil damage suits cannot be brought against judges who intentionally or wantonly violate constitutional rights, would elevate state judges above the constraints of the Constitution, nullifying the Supremacy Clause and destroying constitutional guarantees.

In any case, these immunities apply only to judicial and legislative acts. They do not preclude prospective declaratory and injunctive relief from the administrative and prosecutorial acts at issue in this case.

The District Court correctly followed this Court's decision last term in *Hutto* v. *Finney,* 437 U.S. 678 (1978), by awarding fees and costs against the state judicial officers, in their official capacity, to be paid with state funds. Wherever state governmental immunities do not bar the underlying action, those immunities do not bar a fee award from state funds under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. The District Court acted well within its discre-

tion in entering this award because no special circumstances exist that render the award unjust.

ARGUMENT

I. THE CONSUMER GROUPS CAN SUE THE VIRGINIA COURT FOR PROSPECTIVE DECLARATORY AND INJUNCTIVE RELIEF FROM ITS UNCONSTITUTIONAL RULE.

A. Judicial Immunity Does Not Preclude Prospective Relief From Constitutional Wrongs.

Disciplinary Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility indisputably violated the constitutional rights of the consumer groups and the public to gather, publish and receive information on available legal services. Although the Virginia Court now concedes the unconstitutionality of its Rule, it claims immunities that would leave the consumer groups and the public defenseless against its infringement of their constitutional rights.[7] The Virginia Court never

[7]Because the Virginia Court refused to amend its Rule, an injunction against the Rule's enforcement was required to assure attorneys that disciplinary proceedings would not be brought under the Rule and to make possible the publication of the directory. The immunities asserted by the Virginia Court would defeat the injunction granted in this case prohibiting all enforcement of the Rule, including enforcement by the Virginia Court, *sua sponte,* and would perpetuate the unconstitutional chill cast by the Rule on constitutional freedoms.

In *Dombrowski* v. *Pfister,* 380 U.S. 479, 492 (1965), the Supreme Court found civil rights activists to be entitled to an injunction against state officers because "the denial of injunctive relief may well result in the denial of effective safeguards against the loss of protected freedoms of expression and cannot be justified." Here too, an injunction against all forms of enforcement of the un-

claimed these immunities during the four years of litigation that preceded the decision from which this appeal is taken. In fact, on remand, that Court asked the District Court to enter an order declaring the Rule unconstitutional and enjoining the Virginia Court from enforcing the Rule against attorneys for providing information for the directory. (A. 35). The Virginia Court is challenging the authority of the District Court to grant prospective declaratory and injunctive relief from its constitutional wrongs solely to defeat the fee and cost award granted in this case.[8]

Never during the history of this country has the Supreme Court ever applied governmental immunities to preclude prospective relief against judges' unconstitutional conduct. The Virginia Court's claim to immunity

constitutional rule was required to safeguard first amendment rights. The need for that injunction was especially strong because the Virginia Court had not amended the Rule for almost two years since *Bates* was decided, and well-publicized criminal indictments had been brought against a Virginia attorney for advertising truthful information virtually identical to the information held to be constitutionally protected in *Bates.*

Because the rule had numerous unconstitutional applications, outside the specific facts of this case, the district court correctly invalidated the Rule altogether. *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971) (Black, J. concurring); *Smith* v. *People,* 361 U.S. 147, 151 (1959); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964).

[8]To establish their entitlement to the fee and cost award, the consumer groups need only show that they were properly granted declaratory relief against the Virginia Court and, therefore, prevailed. The availability of declaratory relief is an issue distinct from the propriety of injunctive relief. *Stefell* v. *Thompson,* 415 U.S. 452 (1974); *Zwickler* v. *Koota,* 389 U.S. 241, 254-5 (1967). Declaratory relief may more readily be obtained from the state than injunctive relief. *Perez* v. *Ledesma,* 401 U.S. 82, 104 (1971) (Brennan, J. concurring).

here is unprecedented, unwarranted and unsupported by public policy. Acceptance of these claims would elevate state judges above the strictures of the Constitution, nullify constitutional guarantees and overturn over 100 years of principled decisionmaking by the Supreme Court establishing that state officials are bound by the Constitution.

The U.S. Constitution, Article 6, clause 2, explicitly requires state judges to comply with its mandates:

> This constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the Contrary notwithstanding.

To safeguard constitutional rights from state infringement, the Supreme Court has consistently upheld the right of citizens to sue state officials for prospective declaratory and injunctive relief. *Ex parte Young,* 209 U.S. 123, 159-160 (1908); *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976). Governmental immunities that bar damage awards against the State do not preclude prospective relief from unconstitutional State conduct because, as explained by Professor Charles Alan Wright, "the doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law." Wright, Handbook of the Law of Federal Courts 209-210 (3d ed. 1976). *Compare Ex parte Young, supra; Fitzpatrick* v. *Bitzer, supra and Edelman* v. *Jordan,* 415 U.S. 651, 663-671 (1974).

The availability of prospective redress against state judges' infringement of constitutional rights is absolutely necessary to preserve the supremacy of federal constitutional and statutory law, and our constitutional form of

government. Without this redress, state judges could violate constitutional rights with impunity, thereby transforming those precious rights into mere hollow promises that none can enforce. This Court's decision in *Stump* v. *Sparkman,* 435 U.S. 349 (1978) established that judges are absolutely immune from damage actions even when they intentionally or wantonly violate constitutional rights.[9] To deprive individuals who suffer egregious infringement of their constitutional rights of declaratory and injunctive relief which protects those rights in the future would nullify the constraints imposed on state judges by the Constitution. It is a fundamental prerequisite to our constitutional form of government that, as this Court stated in *Butz* v. *Economou,* 438 U.S. 478,506 (1978), "individuals whatever their position in government are subject to federal law. 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity.' "

The importance of this rule of law in maintaining our constitutional form of government was made clear by this Court 100 years ago in *Ex parte Virginia,* 100 U.S. 339 (1880). There, the Supreme Court upheld the arrest and federal indictment of a state court judge pursuant to the predecessor statute to 42 U.S.C. § 1983, stating:

> [a] State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision [Fourteenth Amendment], therefore, must mean that no

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[9]Judicial immunity has been characterized as "absolute" in that it bars all damage actions challenging a judge's conduct, unless the judge lacks jurisdiction over a matter. However, that characterization does not extend this immunity to equitable suits. *Compare Imbler* v. *Pachtman,* 424 U.S. 409 (1976) and *Ex parte Young,* 209 U.S. 123 (1908).

> agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. . . . This must be so, or the constitutional prohibition has no meaning.

Id. at 347. *See Ex parte Bradley,* 74 U.S. (7 Wall.) 364 (1868).[10]

The federal courts have refused to violate this fundamental precept of constitutional law by extending judicial immunity to declaratory or equitable actions, *Person* v. *Association of Bar of City of New York,* 554 F.2d 534, 537 (2d Cir.1977); *Fowler* v. *Alexander,* 478 F.2d 694 (4th Cir. 1973); *Erdmann* v. *Stevens,* 458 F.2d 1205, 1210 (2d Cir. 1972), *cert. denied,* 409 U.S. 889 (1972); *Littleton* v. *Berbling,* 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom. O'Shea* v. *Littleton,* 414 U.S. 488 (1974) *Jacobson* v. *Schaefer,* 441 F.2d 127, 130 (7th Cir. 1971); *United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *Cassidy* v. *Ceci,* 320 F. Supp. 223 (E.D. Wisc. 1970); *Larsen* v. *Gallogly,* 361 F. Supp. 305 (D.R.I. 1973), *vacated as moot,* 420 U.S.C. 904 (1975); *Rakes* v. *Coleman,* 318 F. Supp. 818 (E.D. Va. 1970); *Conover* v. *Montemuro,* 304 F. Supp. 259 (E.D. Pa. 1969).[11]

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[10]See, *Cooper* v. *Aaron,* 358 U.S. 1, 18 (1958). ("No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."); *Perez* v. *Ledesman,* 401 U.S. 82, 104-106 (1971) (Brennan, J. concurring).

[11]The lower courts are divided on whether equitable suits may be brought against state judges challenging discretionary judicial decisions rendered in cases or controversies where, as stated in *Gay* v. *Heller,* 252 F.2d 313, 315 (5th Cir. 1958), "[t]he normal way to correct errors in the trial or other disposition of a lawsuit is by appeal, not by suing the judge." *Compare: Littleton* v. *Berbling,* 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom. O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Stephen* v. *Drew,* 359 F.Supp. 746 (E.D. Va. 1973); *Wallace* v. *McDonald,* 369 F.Supp. 180, 188 (E.D.N.Y. 1973); *United States* v. *Clark,* 249 F.Supp. 720, 727 (S.D. Ala. 1965); *Bramlett* v. *Peterson,* 307 F.Supp. 1311, 1321 (M.D. Fla. 1969); *Phillips* v. *Cole,* 298 F.Supp. 1049 (N.D. Miss. 1968); *DeVita* v. *Sills,* 422 F.2d 1172 (3rd Cir. 1970); *Staud* v. *Stewart,* 366 F.Supp. 1398 (E.D. Pa. 1973), aff'd, 547 F.2d 1164 (3rd Cir. 1977); *Jacobson* v. *Schaefer,* 441 F.2d 127, 130 (7th Cir. 1971); *United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *and* the cases cited in Brief on Behalf of the Appellants at 11, n.5.

In *Law Students Civil Rights Research Coun., Inc.* v. *Wadmond,* 299 F. Supp. 117 (S.D.N.Y. 1969), *rev'd on other grounds,* 401 U.S. 154 (1971) (Friendly, J.), a Three-Judge Court refused to apply such immunity to a suit seeking prospective relief from unconstitutional court rules, explaining that

> [w]e fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a state law that allegedly deprives

However, in these cases, comity and abstention, rather than judicial immunity, explain the federal courts' decision to deny review of the legality of judges' conduct. For example, in *Cheramie* v. *Tucker,* 493 F.2d 586 (5th Cir. 1974), the federal court refused to hear a claim that a state court had erred and misapplied state law, thereby depriving the plaintiff of a due process right. The *Cheramie* court acknowledged that injunctive actions could be maintained against judges, but nonetheless declined to intervene because the interpretation of state law is committed to the discretion of state judges. *Id.* at 588. This case should have been decided on comity, rather than judicial immunity grounds. Another example is *Gay* v. *Heller,* supra, in which the plaintiff failed to appeal a decision of a state circuit court judge, and then later attempted to attack that judgment collaterally by suing the judge. Judicial immunity was applied to prevent the plaintiff from circumventing state appellate procedures. Again, comity considerations better explain the court's decision. Where judges' attorney conduct rules on their face infringe on consumers' constitutional rights, federal judicial review of those rules does not interfere with state judges' authority to determine the meaning of state law or with state appellate procedures.

> citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed.

Government officials who seek sweeping immunities from suit carry the burden of demonstrating that public policies necessitate such immunity. *Butz* v. *Economou, supra,* 438 U.S. at 506. Without question, the Virginia Court has not sustained its burden of showing that the traditional justifications for judicial immunity or that any public policies dictate depriving persons of prospective relief from judges' constitutional wrongs.

Judicial immunity was created at common law to protect judges from litigation that would interfere with the performance of judicial duties. As explained in *Butz* v. *Economou, supra,* 438 U.S. at 512,

> controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. Absolute immunity is thus necessary to assure that judges. . . can perform their respective functions without harrassment or intimidation.

Parties angered by a judge's decision might sue and attempt to impart malicious motives to the judge to recover damages from the judge personally. Judges' fear of lawsuits attacking their motives and of personal liabilities would deter independent decisionmaking. *Bradley* v. *Fischer,* 80 U.S. (13 Wall.) 335, 347 (1871). Thus, judicial immunity serves to safeguard the public's interest in an impartial and effective judiciary. However,

it is not intended to benefit personally those judges who disregard the law to the detriment of individuals and the public. *Pierson* v. *Ray,* 386 U.S. 547, 554 (1967).

In contrast to damage actions, lawsuits that seek a declaration that a court Rule is unconstitutional and an injunction against its enforcement do not deter desirable judicial behavior. These suits are not brought to avenge judicial decisionmaking or to impugn the integrity of judges; they do not threaten judges with personal liabilities; they bear no resemblance to the harrassing damage actions which could impair the viability of the judiciary. See *Bradley* v. *Fischer, supra,* 80 U.S. (13 Wall.) at 347.

Instead these suits are analogous to appeals in which a court with the power of review merely determines if the law has been correctly interpreted and applied by another Court. The possibility of such review should instill no greater fear in judges than the possibility of an appeal, which judges face on a regular basis with no impairment of their judicial functions. The Virginia Court's failure until now to claim judicial immunity in this suit and its total failure to claim it in another case that challenged its disciplinary rules, *Hirschkop* v. *Snead,* 594 F.2d 356 (4th Cir. 1979), very strongly suggest that these cases have not, in fact, interfered with the functioning of the Virginia Court.

Moreover, equitable suits will not be so numerous as to distract judges from their judicial obligations. In the ordinary case, unlike here, judicial errors can and will be corrected through appeals, rather than through suits against judges. The low number of declaratory and injunctive actions brought against judges in those circuits

which permit these actions attests to this fact.[12] Judges incur no costs to defend these few suits where, as here, they are represented by the state attorney general. They devote a nominal amount of time to the defense of these suits because most primarily involve issues of law. Frivolous suits can quickly be disposed of by firm application of the Federal Rules of Civil Procedure. *Butz* v. *Economou, supra,* 438 U.S. at 507-508. Therefore, judicial immunity from declaratory or injunctive actions is not required to enable judges to perform their responsibilities in an independent, but constitutional, fashion.[13]

Just as the judicial immunity accorded quasi-judicial officers is limited to damage actions, so too should the judicial immunity extended to judges for judicial acts be limited. Judicial immunity applies to prosecutors' quasi-judicial acts, such as the decision to prosecute, because of the similarity between those acts and the duties performed by judges. *Imbler* v. *Pachtman,* 424 U.S. 409, 422-429 (1976). Both prosecutors and judges render judgments that necessarily engender hostilities in parties and could elicit numerous retaliatory damage actions. Absolute judicial immunity from damage awards serves to protect both from lawsuits that would interfere with the independent and forceful performance of their public responsibilities. *Id.*

[12]Counsel to the consumer groups have discovered only those cases cited the briefs filed in this case and several other cases. *See* J.S. at 10, n.5; pp. 12-13, 19, 24-26, 32 n.29, *supra* & *infra.*

[13]Another historical reason for the judicial immunity doctrine, discussed in English common law cases, is that subjecting the judges to damage suits is unseemly. However, declaratory or equitable actions are no more unseemly than an appeal from a judge's decision. Both merely question the correctness of a judge's determination. Neither attempts to impose personal liabilities on judges.

Nonetheless, judicial immunity does not shield prosecutors from suits challenging their judicial acts when only declaratory and injunctive relief is sought. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *Ex parte Young, supra,* 123 U.S. at 159-160. Such equitable relief enables people to protect their rights, yet does not impair the ability of prosecutors to perform properly their prosecutorial responsibilities. Similarly, equitable suits against judges who infringe on constitutional rights safeguard constitutional guarantees without compromising the viability of the judiciary.[14]

B. 42 U.S.C. § 1983 Authorizes Suits Seeking Prospective Relief From State Court Judges' Unconstitutional Acts.

If judicial immunity were extended to suits seeking prospective relief, then Congress necessarily would have abolished such immunity from 42 U.S.C. § 1983 actions.

[14]Indeed, judicial immunity did not prevent the English Courts from enjoining lower court judges. 1 Holdsworth, a History of English Law 226-239 (7th ed. 1956) ("Holdsworth"). Amicus attorneys general mistakenly rely on *Heath* v. *Rydley,* 79 Eng. Rep. 286 (Cro. Jac. 1614) to establish that the English common law granted judges immunity from suits in equity. Brief Amicus Curiae of the State of South Carolina, et al., at 4. In *Heath,* a court of equity refused to enjoin the enforcement of a common law court's decision. In substance, although not in form, *Heath* was a suit against the common law judge for a declaration that the judge had acted contrary to law and an injunction against his judgment. However, *Heath* was not followed by other courts of equity, 1 Holdsworth, *supra* at 461 (citing *Courtney* v. *Granvil,* (1615) Cro. Jac. 343) and was overruled by order of King James I, on July 26, 1616. *Id.* at 463-465. That order explicitly authorized courts of equity to review and enjoin decisions of courts of common law. *Id.* Indeed, King James I applauded his decision and commented: "[a]s God contains the sea within his bounds and marches so is it my office to make every court contain himself within his own limits." *Id.* at 463 n.3.

1. Congress Has Authority to Abrogate Judicial Immunity From Declaratory and Injunctive Suits.

The Virginia Court argues that Congress cannot abrogate judicial immunity enjoyed by state judges because of the principles of separation of powers embodied in the "guarantee clause" of Article IV, Section 4 of the U.S. Constitution and the Tenth Amendment. Even if judicial immunity had a constitutional basis, which it does not,[15] Congress could abrogate that immunity under the Fourteenth Amendment.

[15]Judicial immunity has no constitutional basis, so that Congress may more easily abolish this immunity than immunities provided under the Constitution. Appellant's argument that the Tenth Amendment prevents Congress from abrogating judicial immunity was rejected by this court in *Monell* v.*Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 690 n. 54 (1978). The Tenth Amendment merely reserves to the States and the people powers not granted to the federal government. However, as explained in *Ex parte Virginia, supra,* 100 U.S. at 346, "in exercising her rights, a State cannot disregard the limitation which the Federal Constitutional has applied to her power." Moreover, the Tenth Amendment does not prevent Congress from exercising the authorities specifically granted to it under the Fourteenth Amendment to enforce that Amendment against the States. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), the case relied on by the Virginia Court in making this argument, was correctly found by this Court in *Monell* to have no bearing on the scope of congressional authority under the Fourteenth Amendment. *Monell, supra* at 690, n. 54. The Virginia Court's claim that federal judicial review of the constitutionality of its actions will impair the independence of the state judiciary was rejected by this Court as early as *Martin* v. *Hunter,* 14 U.S. (1 Wheat.) 304 (1816) and again in *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821).

The separation of powers doctrine does not prevent Congress from granting federal courts jurisdiction over suits against state judges seeking prospective relief from unconstitutional acts. That doctrine is designed to preserve equality between the branches of government, not to grant superiority to a particular branch. To remove state judges from review in federal court would elevate state

That Amendment expressly empowers Congress to enforce its provisions against the states. *Monroe* v. *Pape,* 365 U.S. 167 (1961). The power to abrogate state governmental immunities from suits seeking prospective relief from unconstitutional state acts is inherent in that grant of authority. Thus, in *Fitzpatrick* v. *Bitzer, supra,* 427 U.S. at 455-456, this Court held that the Fourteenth Amendment, Section 5 enables Congress to abolish sovereign immunities enjoyed by the States under the Eleventh Amendment. Citing two suits brought against judges, *Ex parte Virginia, supra,* 100 U.S. at 346-348, and *Mitchum* v. *Foster,* 407 U.S. 225, 238-239 (1972), this Court in *Fitzpatrick* stated:

> There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the *judicial,* executive, and legislative spheres of autonomy previously reserved to the States.
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> * * * *

judges above all branches of government, even above the federal government, nullifying the Supremacy Clause. *Hampton* v. *City of Chicago Cook County, Illinois,* 484 F.2d 602, 607 (7th Cir. 1973) (Stevens, J.). Therefore, this doctrine does not apply to the federal judiciary's relationship to the states. *Elrod* v. *Burns,* 427 U.S. 347, 352 (1976).

Finally, the attributes of a republication form of government, guaranteed under Article 4, Section 4, are determined by Congress, the elected representative of the people. The Virginia Court's claim that Article 4, Section 4 guarantees state judges immunity from suits for prospective relief raises a non-justiciable question. *Baker* v. *Carr,* 369 U.S. 186, 218-225 (1962). In any case, judicial immunity cannot be an element of a republican form of government because many of the states, prior to the Supreme Court decision in *Bradley* v. *Fischer,* 80 U.S. (13 Wall.) 335 (1871), did not provide such immunity to state judges. *See Minor* v. *Happersett,* 88 U.S. (21 Wall.) 162, 175-176 (1875); Liability of Judicial Officers Under Section 1983, 79 Yale L.J. 322, 324 n. 13, 325-327 (1969).

> We think that Congress may, in determining what is "appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

427 U.S. at 455-456 (emphasis added). Therefore, Congress can abrogate judicial immunities to allow persons to bring suit to stop judicial infringement of their constitutional rights. *See Pierson* v. *Ray,* 386 U.S. 547 (1967).[16]

2. Congress Abrogated Judicial Immunity From Equitable Suits Brought Under 42 U.S.C. § 1983

The plain language of 42 U.S.C. § 1983 authorizes equitable suits against state judges who infringe on constitutional rights. The legislative history of 42 U.S.C. § 1983 establishes Congress' intent to authorize persons who suffer a deprivation of constitutional rights at the hands of state judges to obtain a declaration of their rights in federal court and an injunction against future violations.[17] In *Mitchum* v. *Foster, supra,* 407 U.S. at 240-242, (citation omitted), the Supreme Court concluded:

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[16]*See also Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U.S. 278, 290 (1913) ("Congress by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion"); *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 420 (1819).

[17]Congress enacted §1983 to implement the Fourteenth Amendment. The consumer groups' First Amendment rights are guaranteed through the Fourteenth Amendment against action by Virginia. *Gitlow* v. *New York,* 268 U.S. 652 (1925).

> It is clear from the legislative debates surrounding the passage of Section 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against State action, . . . whether that action be executive, legislative or judicial.' Proponents of the legislation noted that state courts were being used to harrass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.
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> * * * *
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> The debate was not about whether the predecessor of § 1983 extended to actions of state courts, but whether this innovation was necessary or desirable.

The *Mitchum* court further held that § 1983 authorized federal courts to issue injunctions to stay state court proceedings to prevent the loss of constitutional rights:

> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress.

Id. at 242 (citation omitted).

The facts in *Mitchum* bear a striking resemblance to this case. That suit was brought against a number of

state officials, including a state court judge. Plaintiffs sought to obtain a declaration that the judge's preliminary order infringed on constitutional rights and an injunction staying proceedings then pending before the judge. The judge did not claim judicial immunity. Without discussing if judicial immunity applied, the Supreme Court held that 42 U.S.C. § 1983 authorized the declaratory and injunctive relief requested.[18]

In another suit brought against a judge, *Law Students Civil Rights Research Coun., Inc.* v. *Wadmond, supra,* 299 F.Supp. at 124, a Three-Judge District Court held that judicial immunity does not bar equitable suits brought under § 1983. Writing for the Court, Judge Friendly concluded that "[t]o hold otherwise would be to leave without a remedy a significant class of the deprivations of federal rights under color of law that Congress intended federal courts to redress under 42 U.S.C. § 1983 and 28 U.S.C. § 1343." *Id.* at 124. *Accord Person* v. *Association of Bar of City of New York, supra,* 554 F.2d at 537.

[18]Indeed, the very existence of the anti-injunction statute suggests congressional intent that judicial immunity not prevent federal district courts from examining the constitutionality of state judges' actions. Otherwise, that statute would be unnecessary.

Pierson v. *Ray,* 386 U.S. 547 (1967) and *Stump* v. *Sparkman,* 435 U.S. 349 (1978), are not controlling here. These cases held that Section 1983 did not abolish judicial immunity from damage suits because the legislative history of the Act did not specifically provide for such suits. In contrast, Congress did express intent to permit individuals to protect their constitutional rights from infringement by state judges by obtaining a declaration of those rights in federal court and injunctive relief to protect those rights from future infringement. *Mitchum* v. *Foster, supra,* 407 U.S. at 240-242.

C. Judicial Immunity Does Not Apply to the Virginia Court's Administrative Act of Promulgating Disciplinary Rules

Even if judicial immunity were to apply to declaratory and equitable suits brought under § 1983, that immunity does not attach to the Virginia Court's administrative act of regulating attorney participation in consumer directories, but applies only to its "judicial acts." As explained in *Butz* v. *Economou, supra,* 438 U.S. at 511, judges' immunity arises "not because of their particular locations within the Government, but because of the special nature of their responsibilities." When judges resolve cases or controversies by applying existing law, they engage in judicial acts. *Stump* v. *Sparkman,* 435 U.S. 349 (1978).[19] However, when judges issue general rules to regulate the future conduct of the entire legal profession in the State, they perform an administrative rulemaking function.[20]

[19]The definition of "judicial act" set forth in *Stump* v. *Sparkman, supra,* 435 U.S. at 362, assumes the existence of a case or controversy involving "parties":

> The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself . . . to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.

[20]Judicial immunity was never applied in common law cases to judges' non-judicial actions. In early English law, prior to the development of appeals procedures, unsuccessful litigants obtained review of lower court decisions by suing the lower court judge in a higher court. 1 Holdsworth, A History of English Law 213, 214, 215 (7 ed. 1956) ("Holdsworth"); Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions, 1976 Duke L.J. 95, 112 n.95. With the advent of appellate procedures, review of the correctness of a judge's decision was obtained through appeals. Judicial immunity was then developed to protect judges from damages actions challenging those decisions, *Id.* 6 Holdsworth, *supra*

The Code of Virginia, § 54-48, authorizes the Virginia Court to "prescribe, adopt, promulgate and amend rules and regulations . . . [p]rescribing a code of ethics governing the professional conduct of attorneys-at-law. . . ." These authorizations are akin to those granted in the very same title of the Code by the Virginia Legislature to state agencies and by Congress to federal administrative agencies responsible for regulating various industries. Just as Virginia administrative agencies issue ethical rules governing the conduct of doctors, nurses, architects and numerous other professions,[21] so does the Virginia Court issue rules and regulations controlling the conduct of attorneys.

In *Lathrop* v. *Donohue,* 367 U.S. 820, 827 (1961), the Supreme Court held that a Rule promulgated by the Wisconsin Supreme Court to integrate the Wisconsin Bar was not a judicial act:

> Integration of the Bar of Wisconsin bore no resemblance to adjudication. The State Supreme Court's action disposed of no litigation between parties. Rather, the court sought to regulate the profession by applying its orders to all present members of the Bar and to all persons coming within the described class in the future.[22]

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at 234-235 (2d ed. 1937), *Floyd* v. *Barker,* 77 Eng. Rep. 1305 (K.B., 1607), but not to judges' administrative actions. Thus for example, in *Attwood* v. *Chapman,* [1914] 3 K.B. 283-286, the Court held that judicial immunity did not apply to judges who were not sitting as a "Court in law" deciding cases, but instead were granting licenses. See *Purcell* v. *Sowler,* [1877] 2 C.P.D. 215 (Mellish, L.J. concurring).

[21]Code of Virginia, Title 54.

[22]The issue before the *Lathrop* Court was whether the Wisconsin Supreme Court's rule was a "statute" for purposes of 28 U.S.C. §1257(2), so that the Supreme Court could hear an appeal from a

The Supreme Court and lower federal courts many times have found judges' regulatory acts to be administrative. See *Keller* v. *Potomac Elec. Co.,* 261 U.S. 428 (1923) (Supreme Court of District of Columbia's involvement in rate setting was not a judicial act); *Public Service Co. of Northern Illinois* v. *Corboy,* 250 U.S. 153, 161-162 (1919) (circuit court which regulated establishment of drainage districts acted in an executive, not a judicial, capacity); *Prentis* v. *Atlantic Coast Line,* 211 U.S. 210 (1908) (Virginia commission's setting of railway passenger rates is not a judicial act); *Ex parte Rowland,* 104 U.S. 604, 613 (1881) (probate judge who regulated affairs of county, pursuant to statutory authorization, performed an administrative, not a judicial, function); *Ktsanes* v. *Underwood,* 552 F.2d 740, 743 (1977) (Illinois Supreme Court's refusal to create an exemption to its rules controlling admission to the Illinois bar was an administrative not a judicial act); *Lynch* v. *Johnson,* 420 F.2d 818 (6th Cir. 1970), *cited in Stump* v. *Sparkman, supra,* 435 U.S. at 361 n.10. (county court's regulation of affairs of county was an administrative not a judicial act); *Law Students Civil Rights Research Coun., Inc.* v. *Wadmond, supra,* 299 F. Supp. at 127. *See also Ex parte Virginia, supra,* 100 U.S. at 348 (selecting jurors is a ministerial, not a judicial act); *Roudebush* v. *Hartke,* 405 U.S. 15 (1972) (granting of recount petitions after election and appointment of commissioner to oversee recount is a ministerial or administrative, but

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Wisconsin Supreme Court decision upholding the validity of that rule. The term "statute" had been broadly defined under §1257(2) to include any provision which has the force of law in a state, including administrative regulations. The *Lathrop* Court noted that the rule was legislative in character in that it had the effect of law in Wisconsin. However, it did not suggest that legislative immunity would apply to this administrative action.

not a judicial, act); *United States* v. *Ferreira,* 54 U.S. (13 Howard) 39 (1851) (procedures followed by judges to receive and adjust war claims are not judicial).[23]

Because the issuance of rules is administrative, the protections afforded individuals against unconstitutional judicial conduct are absent.[24] Foremost, the right of appeal, which has been cited as justification for this immunity, is non-existent.[25] In *Pierson* v. *Ray, supra,* 386, U.S. at 554, the court upheld judicial immunity from a damage action because "[a judge's] errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption."[26] However, no appeal

[23]Several of those decisions refer to the regulatory activities of courts as legislative rather than judicial in character only in order to justify judicial review of the activities, e.g., *Prentis* v. *Atlantic Coast Line, supra.* The decisions correctly do not apply legislative immunity which would preclude judicial review of these administrative actions. Although "[l]egislative or substantive regulations are 'issued by an agency pursuant to statutory authority,' " agency decisionmakers do not enjoy legislative immunity from suits challenging the constitutionality of the regulations and seeking an injunction against their enforcement. *See Batterton* v. *Francis,* 432 U.S. 416, 425 n.9 (1976); *Ex parte Young,* 209 U.S. 123 (1908).

[24]Also, because an administrative act is at issue, the purposes underlying judicial immunity do not apply. Judicial review of the constitutionality of a court rule is identical to appellate review of judicial decisions and will not compromise judicial independence. See pp. 14-17, *supra.*

[25]Kates, Jr., Immunity of State Judges under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered, 65 Nw. U.L. Rev. 615, 629 n.43 (1970); Note, Liability of Judicial Officers Under Section 1983, 79 Yale L.J. 322, 330 (1969); Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263, 272 (1937).

[26]Following *Pierson,* the Court of Appeals for the Fifth Circuit noted:

> [W]e too are mortified by the spectre of deprivations of the civil rights of our citizenry. But when the infringement comes at the hands of a judge, our system offers its own built-in corrective — the improprieties of judges may be attacked and *appealed from,* either directly or collaterally.

McAlester v. *Brown,* 469 F.2d 1280, 1283 (5th Cir. 1972) (emphasis added).

procedures were available to the consumer groups to correct the Virginia Court's unconstitutional Rule. To apply judicial immunity where no right to appeal exists would be a grave misapplication of that doctrine, eliminating the sole remedy for a constitutional wrong.

Other public protections that reduce the likelihood of unconstitutional judicial acts also do not accrue to administrative functions. Judges who act in a judicial capacity are bound by precedent; the Virginia Court when it issues regulations controlling the legal profession is not. Judges respond to adversarial proceedings open to the public, in which all views are fully presented; the Virginia Court issues regulations in response to a petition from the Virginia Bar, without any adversarial hearings in which conflicting views may be aired. *Butz* v. *Economou, supra,* 438 U.S. at 512. The absence of these basic public protections against the adoption and enforcement of the unconstitutional Rule militates against expanding judicial immunity to encompass administrative acts.

D. Judicial Immunity Does Not Prevent the District Court From Enjoining the Virginia Court's Prosecutorial, Quasi-Judicial Acts.

The Virginia Court's enforcement of the Rule is similar to the responsibilities performed by prosecutors and is quasi-judicial rather than judicial in nature. *Im-*

bler v. *Pachtman,* 424 U.S. 409 (1976). The Virginia Court can bring disciplinary proceedings against attorneys on its own initiative, without the involvement of the Bar. *Legal Club* v. *Light,* 137 Va. 249 (1923). Indeed, the Supreme Court long has recognized the inherent authority of the courts to discipline attorneys.

> We do not doubt the power of the court to punish attorneys as officers of the same, for misbehavior in the practice of the profession. This power had been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein.

Ex parte Bradley, 74 U.S. (7 Wall.) 364, 374 (1869).

Also, under the Virginia Code, § 54-74, complaints against attorneys who violate disciplinary rules can be filed directly with any court of record, including the Supreme Court of Virginia, without ever proceeding through the Bar. *Defoe* v. *Friedlander,* 211 Va. 121 (1970). Whenever a complaint is filed, the Virginia Court can initiate prosecutions by certifying an order against attorneys to show cause why their licenses to practice should not be revoked or suspended and by appointing two judges to sit with the original judge to rule on the complaint, Va. Code, § 54-74(2).

Such prosecutorial activities are not shielded by judicial immunity from suits seeking equitable relief. The Supreme Court's 1908 decision in *Ex parte Young,* 209 U.S. 123, 159-160 (1908) established the right to sue to enjoin prosecutions that infringe on constitutional rights. In the case most analogous to the case now before this court, *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), the Supreme Court found proper an injunction which prohibited prosecutions under a statute that infringed on freedoms of expression. In *Dombrowski,* as in this case, an injunction against all enforcement of the unconstitutional law was required to preserve First Amendment rights. Judicial immunity does not bar such relief.

E. Legislative Immunity Does Not Apply to the Rulemaking or Enforcement Activities of the Virginia Court.

Similarly, legislative immunity does not extend to the Virginia Court's administrative and prosecutorial acts. *Hutchinson* v. *Proxmire,* 99 S. Ct. 2675 (1979); *Doe* v. *McMillan,* 412 U.S. 306 (1973). Contrary to assertions of the Virginia Court, the federal immunity accorded state legislators does not derive from the Speech and Debate Clause of the U.S. Constitution or from State law. Its source is the federal common law. *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 404 (1979); *Tenny* v. *Brandhove,* 341 U.S. 367 (1951); *Hampton* v. *City of Chicago, Cook County, Illinois,* 484 F.2d 602, 608 (7th Cir. 1973) (Stevens, J.).

This immunity is derived from the immunity created in England to protect members of Parliament from the efforts of the Crown to quash speeches that displeased the King. *United States* v. *Johnson,* 383 U.S. 169, 178 (1966). It was adopted in the United States not to benefit legislators but "to support the rights of the people by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal." *Tenny* v. *Brandhove, supra,* 341 U.S. at 373-374 (quoting with approval *Coffin* v. *Coffin,* 4 Mass. 1, 28 (1808)); *United States* v. *Johnson, supra,* 383 U.S. at 180-181. Legislative immunity applies only to the extent required to prevent the executive and

judicial branches from interfering directly or indirectly with powers reserved to the legislative branch. *United States* v. *Brewster,* 408 U.S. 501, 517 (1972).[27]

To extend legislative immunity to this case would insulate an enormous number of State and federal administrative officers from suits for declaratory and injunctive relief from their constitutional wrongs. *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975). Such an application of legislative immunity would be totally at odds with the well-established doctrine that the people can defend their constitutional rights from infringement by administrative officials by bringing suits for declaratory and injunctive relief. *Ex parte Young,* 209 U.S. 123 (1908).

Moreover, the administrative functions of the Court are entirely different in nature than the law-making ac-

[27]Thus, this Court's decision in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391 (1979) does not apply here. That decision involved an interstate body, formed by an interstate compact approved by the Congress, that controlled the development of the entire Lake Tahoe region. As explained by the Ninth Circuit in that case, "such [interstate] compacts, by their nature, establish regional legislatures." *Jacobsen* v. *Tahoe Regional Planning Agency,* 566 F.2d 1353, 1365 (9th Cir. 1977). Because the interstate body possessed authorities that neither state legislature could perform independently or control independently, the body acted as an interstate legislature. *Id.* In contrast, here, the Virginia Court is exercizing delegated authorities indentical to those possessed by state administrative agencies which do not enjoy legislative immunity.

Moreover, the Ninth Circuit held that prospective declaratory and injunctive relief could be granted against the interstate body. 566 F.2d at 1360 & 1366. That decision was not reversed by the Supreme Court. 440 U.S. at 391. Thus, legislative immunity does not bar prospective relief from the Virginia Court's enforcement of its unconstitutional Rule.

tivities of Congress. While Congress, before passing legislation, holds hearings at which representatives of diverse interests can express their views; the Virginia Court responds only to a petition from the Bar in issuing and amending its Rules. Legislators debate proposed legislation on the floors of the House and Senate before the public view; however, the Virginia Court makes its decisions on rules in secret. Congress passes laws, but does not enforce them; the Virginia Court both issues and enforces its rules. Because the Virginia Court's administrative authorities bear so little resemblence to the legislative activities of Congress, legislative immunity should not be expanded to encompass the actions at issue in this case. See *Gravel* v. *United States,* 408 U.S. 606, 622 (1972).

None of the purposes for legislative immunity even apply here. Immunizing the Virginia Court from suit would not preserve the separation of powers assigned to the legislative branch. This case creates no conflict between the legislative and judicial branches of government. *Baker* v. *Carr,* 369 U.S. 186, 210-211 (1962). Instead, the relationship between a state and a federal court is at issue. As stated in *Elrod* v. *Burns,* 427 U.S. 347, 352 (1976), "the separation-of-powers principle. . . has no applicability to the federal judiciary's relationship to the States."[28]

To extend legislative immunity to the Virginia Court would not safeguard the public's right to unfettered representation but, instead, would leave the people defenseless against infringement of constitutional rights

[28]To hold otherwise would preclude federal judicial review of the constitutionality of state official's conduct and destroy the supremacy of federal constitutional and statutory law.

by appointed officials. The Virginia Court judges are not elected "representatives of the People." They are appointed officials with no direct accountability to Virginia citizens. Virginia Constitution, art. VI, §§ 2 & 7. The brake on legislators' misconduct provided by the electoral process would not protect Virginia citizens from infringement of their rights by the Virginia Court. *Tenny* v. *Brandhove,* supra, 341 U.S. at 378 ("[s]elf discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.")

Finally, this suit does not threaten, directly or indirectly, legislators' freedom to speak or debate. It does not even attempt to impinge on speeches or debates of the Virginia Court. Instead, the consumer groups merely seek judicial review of the constitutionality of a Court Rule. Legislative immunity has never barred judicial review of administrative rules. Absolutely no reason whatsoever exists for extending the doctrine here.

Thus, because the common law doctrine of legislative immunity does not encompass administrative functions performed by judges and because the purposes of that doctrine do not apply to this case, legislative immunity should not, as the Virginia Court asks, be expanded to protect its unconstitutional administrative acts.[29]

[29]The Virginia Court also seeks to avoid judicial review of its conduct by belatedly arguing that it is not a proper party to this case because a declaration of its Rule invalidity and an injunction enjoining all enforcement of the Rule does not invoke or require any judgment against it. However, it failed to raise this argument in the District Court and in its Jurisdictional Statement, so that the question is not now properly before this Court. *Phillips Chemical Co.* v. *Dumas Ind. Sch. Dist.*, 361 U.S. 376, 386 n.12 (1960);

II. THE CONSUMER GROUPS ARE ENTITLED TO THE AWARD GRANTED UNDER 42 U.S.C. § 1988 FROM STATE FUNDS.

The fee and cost award now before this Court is in all essential respects identical to the award upheld by this Court last term in *Hutto* v. *Finney,* 437 U.S. 678

Duignan v. *United States,* 274 U.S. 195, 200 (1927), *Helvering* v. *Wood,* 309 U.S. 344, 348-349 (1940).

Moreover, this argument is totally at odds with the Federal Rules of Civil Procedure and the facts in this case. F.R.C.P., Rule 20 permits plaintiffs to join as defendants any persons against whom they assert a right to relief arising from the same occurrences and involving common questions of law or fact. Joinder of parties with any interest in a dispute is strongly encouraged by the Rule. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966). Because the consumer groups sought a declaration that the Virginia Court and the Bar had jointly infringed on the groups', and their members' First Amendment rights and an injunction enjoining both defendants from disciplining attorneys for participating in the directory, the Virginia Court was properly joined as a defendant under Rule 20.

Amicus Conference of Chief Justices erroneously claims that just as legislators are not proper or necessary parties to suits challenging legislation, so too are judges improper parties to suits challenging their rules. Brief Amicus Curiae on Behalf of the Conference of Chief Justices In Support of the Jurisdictional Statement at 9. However, it is the legislative immunity doctrine, and not Rule 20, which prevents suits against legislators. There is no reason, legislative immunity aside, why legislators would not be a proper party to suits seeking prospective relief from their unconstitutional conduct.

Indeed, the Virginia Court arguably was an indispensable party under Rule 19, F.R.C.P. because its joinder was required to provide the consumer groups with complete relief from the unconstitutional Rule. Only by obtaining an injunction against all enforcement of the Rule could the consumer groups assure full participation in the directory by attorneys and overcome the chill cast on their constitutional rights by the Rule. See n.7, *supra. Ricci* v. *State Board of Law Examiners,* 569 F.2d 782, 784 (3rd Cir. 1978) (Pennsylvania Supreme Court held indispensable party to suit challenging its rules governing admission to Pennsylvania bar.);

(1978).[30] Both awards were assessed against state officials, in their official capacity, to be paid with state funds.[31] The Virginia Court's argument that judicial immunity bars the District Court from making this award is contrary to the plain language and strong legislative history of the Civil Rights Attorney's Fees Award Act of

Hirschkop v. *Snead, supra,* 594 F.2d at 363 n.4 (Virginia Supreme Court judges were proper party to suit challenging their attorney disciplinary rules). *Hackin* v. *Lockwood,* 361 F.2d 499 (9th Cir. 1966) (Arizona Supreme Court held an indispensable party to suit challenging its rules); *Murphy* v. *State Bd. of Law Exam. for Com. for Pa.,* 429 F.Supp. 16 (E.D. Pa. 1977) (Pennsylvania Supreme Court held indispensable party to suit challenging its rules). *But compare Law Students Civil Rights Research Council, Inc.* v. *Wadmond, supra,* at 299 F.Supp. at 124 (Amicus Conference of Chief Justices erroneously relies on this decision to argue that the Virginia Court is an improper party. However, the *Wadmond* Court merely held a N.Y. Court not to be an *indispensable* party to a suit challenging its rules; it never suggested that the N.Y. Court was in *improper* party under Rule 20.)

In any case, the consumer groups need only demonstrate that the Virginia Court was a proper, rather than an indispensable party, to prevail.

[30]The District Court has not determined the amount of the fee award to be paid by the Virginia Court. That award could be as much as the $103,707.88 requested by the consumer groups, or less than the $21,017.51 the Virginia Court first claimed to be appropriate, but later rejected as possibly too high. Defendants Response to Motion for Attorney's Fees (July 9, 1979); Defendants Supplemental Memorandum on Attorneys' Fees (July 13, 1979); Plaintiffs' Reply to Defendants' Supplemental Memorandum and to Defendants' Response to Motion for Attorneys' Fees.

[31]The Virginia Court concedes this award will be paid from state funds. Brief on Behalf of Defendants at 5 (June 5, 1978). The award granted in this case places no greater burden on state funds than envisioned by Congress. As stated in the House Report, "[t]he greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976).

1976, 42 U.S.C § 1988 ("Act"). Wherever state governmental immunities do not bar the underlying action, those immunities do not prevent an award under the Act from state funds.

As this Court observed in *Hutto,* "[t]he Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of exception for States defending injunction actions . . . The legislative history is equally plain." *Id.* at 694. The legislative history is replete with unequivocal statements of congressional intent to eliminate all government immunities that might preclude a fee award from state funds:

> [D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either from the official in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) (hereafter "Senate Report"). *See also* H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976) (hereafter "House Report").

Judicial immunity was among the immunities Congress expressly abolished. The House Report[32] finds fee

[32]Amicus Conference of Chief Justices suggests that the House Report should not be used to determine Congressional intent because the Senate Bill, rather than the House version, became law. Brief Amicus Curiae on Behalf of the Conference of Chief Justices in Support of the Jurisdictional Statement at 14. However, the only difference between the two versions was the list of statutes under

awards against judges to be particularly important because judicial immunity limits the availability of reimbursement for damages:

> [I]n some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. [citing *Pierson* v. *Ray, supra,* a judicial immunity case]. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

House Report, *supra* at 9. Immediately thereafter, the House Report provides for fee awards in actions brought against state judges for injunctive relief:

> To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

Id. See, Senate Report, *supra* at 5.

Congress further characterized the fee awards made under the Act as ancillary to injunctive relief so that government immunities would not bar such awards. Prior to this Court's decision in *Hutto,* the lower courts were divided on whether fee awards were more analogous to

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which fees could be awarded. Both provided for the recovery of fees and costs in suits brought under 42 U.S.C. § 1983. And both used identical language to authorize courts to award fees ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.") Thus, the House's statement that this language abolishes judicial immunity is a relevant expression of Congressional intent.

damage awards which could not be granted against state funds, *Edelman* v. *Jordan,* 415 U.S. 651 (1974), or costs incidental to injunctive relief, which could be assessed from state funds, *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976). *Compare Thonen* v. *Jenkins,* 517 F.2d 3, 7 (4th Cir. 1975) and *Skenan* v. *Board of Trustees of Bloomsburg State College,* 436 F. Supp. 657 (M.D. Pa. 1977).

Therefore, both the House and Senate Reports describe these fee awards as a necessary and incidental cost of obtaining injunctive relief vindicating constitutional rights. Senate Report, *supra* at 5-6; House Report, *supra* at 1. Congress also authorizes fees "as part of the costs" which traditionally have been awarded against the States. Thus, in *Hutto,* this Court held:

> We see no reason to distinguish this [attorney fee] award from any other penalty imposed to enforce a prospective injunction. Hence the substantive protections of the Eleventh Amendment do not prevent an award of attorney's fees against the Department's officers in their official capacities.

437 U.S. at 691-692 (footnote omitted).

Congress deemed the shifting of fees to the States as essential to protect constitutional rights from infringement by state officials:

> We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral party of the remedies necessary to obtain such compliance.
>
> * * * *

> If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

Senate Report *supra* at 5 & 6. *See* House Report, *supra* at 1.

This, therefore, is precisely the kind of case in which Congress intended to shift litigation fees and costs to the States. The consumer groups were forced to assume their litigation expenses to protect significant constitutional rights of importance to the public from continued infringement by state officials. Reimbursement will prevent those rights from becoming mere "hollow pronouncements."[33]

[33]The Virginia Court's reliance on *Tenny* v. *Brandhove,* 341 U. S. 367 (1951) to establish that judicial immunity defeats § 1988 awards is misplaced. In that case, the Court held that legislative immunity barred plaintiff from bringing suit altogether under 42 U.S. C. § 1983. This immunity was retained because Congress expressed no intent to abolish legislative immunity from suit. In contrast, here, under 42 U.S.C. § 1988, the court is deciding only whether fees may be awarded to parties who can bring suit against state defendants and prevail. Because those fees are ancillary to injunctive relief properly granted against a state official, those fees may be awarded. *Hutto* v. *Finney, supra,* 437 U.S. at 691-692. And because Congress explicitly stated that no governmental immunities would prevent fee awards under the Act, the award should be upheld. *See* pp. 35-36 *supra.*

III. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN AWARDING FEES AGAINST THE VIRGINIA COURT.

Under 42 U.S.C. § 1988, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Because prevailing parties act as private attorneys general vindicating important constitutional rights, they are entitled to an award under § 1988 unless special circumstances would render an award manifestly unjust. Senate Report, *supra* at 4 and House Report, *supra* at 9 (citing *Newman* v. *Piggie Park Enterprise,* 390 U.S. 400, 402 (1968)). The District Court correctly found no special circumstances to exist in this case and awarded fees and costs against the Virginia Court.

The Virginia Court does not contest that finding or offer a single fact that establishes special circumstances. Instead, without any basis, it claims that the award was intended to penalize it for failing to amend its Rule after *Bates* and that judicial immunity bars punitive awards. However, the District Court's intentions are neither established in fact nor relevant to the proprierty of the fee award.[34] A court has discretion to award fees to prevailing parties from State funds under the Act, if the award is just, regardless of the court's intent. A party cannot defeat a just award by seeking to divine the subjective, unexplicit intentions of the Court granting the award.

Similarly, the Virginia Court's claim that it failed to amend its Rule, in good faith, has no bearing on the

[34]The District Court followed this Court's decision in *Hutto* v. *Finney, supra,* 437 U.S. at 699, n. 32, that good faith is not a defense and found the Virginia Court's assertions that it acted in good faith not to create special circumstances. J.S. at App. 5.

propriety of the fee award. Good faith is not a defense to awards granted under the Act.[35] Among the governmental immunities Congress abrogated in passing § 1988 was good faith immunity. The House Report, *supra,* at 9, notes that "in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy," citing *Wood* v. *Strickland,* 420 U.S. 308 (1975) and *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), two cases upholding good faith immunity in damage actions. The Report then concludes that "[c]onsequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected."[36] *See also* Senate Report, *supra* at 5-6.

Therefore, this Court held in *Hutto* v. *Finney* that "[t]he Act authorizes an attorney's fee award even though the appeal was not taken in bad faith; no one denies that." 437 U.S. at 699, n. 32. *Accord, Brown* v.

[35]The District Court, did hold a fee award against the Bar to be unjust because one year after this suit was brought, the Bar proposed an amendment to the Rule, which it lacked legal authority to promulgate. One effect of the District Court's decision was that the fee and cost award will be paid from state funds, rather than by members of the Bar. The consumer groups contend that this holding was erroneous because the Bar was integrally involved in the infringement of appellants' and their members' constitutional rights prior to and after the initiation of this lawsuit, and because good faith is no defense under the Act. Their cross appeal on this issue is still pending before this court. *See* Jurisdictional Statement in *Consumers Union* v. *Virginia State Bar,* No. 79-185 at 8-10. Whatever the merits of that holding, the District Court correctly concluded that no such special circumstances existed with respect to the Virginia Court.

[36]The Virginia Court even concedes that this language "allow[s] fees for those acts answerable to suit under so-called "good faith immunity." Brief of Behalf of Appellants at 14, n. 8.

Culpepper, 559 F.2d 275, 278 (1977) ("In Title II and Title VI cases, the Fifth Circuit has held that the defendant's conduct, be it negligent or intentional, in good faith or bad, is irrelevant to an award of attorney's fees. We now hold that, consistent with congressional intent, the same standard should apply to § 1988."); *Henderson* v. *Forth Worth Independent School District,* 574 F.2d 1210, 1214 (5th Cir. 1978); *Population Services Intern.* v. *Carey,* 476 F.Supp. 4,7 (S.D.N.Y. 1979); *Lackey* v. *Bowling,* 476 F.Supp. 1111, 1115 (N.D. Ill. 1979) ("We do not dispute defendants' good faith. On the contrary, we commend defendants for changing the challenged policy immediately. . . . But a finding of good faith does not preclude the award of attorneys' fees.") Thus, even if the Virginia Court, in good faith, had failed to amend its Rule to conform to this Court's decision in *Bigelow* v. *Virginia, supra,* 421 U.S. 809 (1975), *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), and *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), such good faith would not bar the award.[37]

[37]Moreover, the Virginia Court did not act in good faith. The Court argues that it was under no obligation to amend its Rule after *Bates* because the Attorney General of Virginia had issued an opinion stating that the Virginia Rule would not be enforced except to the extent that enforcement was allowed under *Bates,* and because the Virginia Court was only enforcing the Rule to that extent.

However, knowing that the consumer groups wanted to publish their directory, and knowing that the reach of the *Bates* decision was unclear, the Virginia Court had an obligation to amend their Rule to clarify what communications it permitted. The Virginia Court's claim that it was enforcing the Rule only to the extent allowed by *Bates* did not remove the chill its Rule had cast on attorneys' and consumers' First Amendment rights. No one knew to what extent that Rule was being, or would be enforced. The Attorney General's vague opinion provided little guidance on the parameters of acceptable speech:

Furthermore, even if the Court had amended its Rule immediately after *Bates,* this would not have rendered unjust the award granted in this case. Parties who prevail at any time during litigation are entitled to reimbursement under the Act. The House Report, *supra* at 7 states:

> Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is necessary.

See Donaldson v. *O'Connor,* 454 F. Supp. 311 (N.D. Fla. 1978); *N.A.A.C.P.* v. *Bell,* 448 F. Supp. 1164

> To the extent, then, that DR-2-101 and DR-2-102. . . impose unreasonable time, manner and place limitations on attorney advertising; or . . . otherwise prohibit advertising which results in greater public benefit than harm, the rules are unenforceable under the First Amendment.

The Virginia Court's extraordinary delay in amending its Rule for more than two years after *Bates* was entirely unjustified. Both the American Bar Association and the vast majority of States responded far more promptly. The Virginia Court focuses on the six states which acted more slowly. Brief on Behalf of Appellants at 20. More instructive is consideration of those which acted more quickly. Within two months after the *Bates* decision, the American Bar Association amended its advertising rules. Within another four months, at least twelve states had responded to *Bates* by adopting new advertising codes. Within one year after *Bates,* at least thirty-four states had amended their advertising codes to provide for attorney advertising. American Bar Association, Regulation of Advertising by Lawyers; Comparisons of American Bar Association Model Code Of Professional Responsibility ABA Proposal B and State Codes (December 1978). Yet, the Virginia Court took over twenty-six months to adopt a very simple code that provides "[a] lawyer or law firm may use or participate in the use of a . . . legal directory listing . . . unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive."

(D.C.D.C. 1978). *See also Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). Thus, the Virginia Court could not defeat an award by bringing its conduct into compliance with the Constitution years after this suit was brought, once it had forced the consumer groups to incur substantial expenses to defend their rights.

Therefore, the reasonableness of the Virginia Court's failure to amend its Rule promptly after *Bates* has no relevance to this case. Because no special circumstances exist which render the award unjust, the District Court acted within its discretion in awarding fees and costs to the consumer groups.

CONCLUSION

The District Court correctly entertained this suit against the Virginia Court. No governmental immunities preclude the consumer groups from obtaining a declaration that the Virginia Court's Rule invades their constitutional rights and an injunction preventing future infringement. Instead, the case law of this Court and strong public policies require the provision of a forum in which persons aggrieved by state judges' unconstitutional conduct can vindicate their rights.

Having prevailed against state officials, the consumer groups are entitled to reimbursement for their fees and costs under the Civil Rights Attorney's Fees Awards Act from state appropriations. The award granted in this case fulfills Congress' objective that reimbursement be available to litigants acting as private attorneys general

who vindicate significant public interests. Therefore, the District Court decision should be affirmed.

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Supreme Court, U.S.
FILED
FEB 14 1980
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-198

SUPREME COURT OF VIRGINIA, et al.,

Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC. et al.,

Appellees.

On Appeal from the United States Distict Court
for the Eastern District of Virginia

APPELLANTS' REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

SUPREME COURT OF VIRGINIA, et al., Appellants,	
v.	No. 79-198
CONSUMERS UNION OF THE UNITED STATES, INC. et al., Appellees.	

APPELLANTS' REPLY BRIEF

I.

THIS CASE INVOLVES NO INTENTIONAL VIOLATION OF CONSTITUTIONAL RIGHTS OR DENIAL OF RELIEF TO CONSUMERS UNION.

The principal arguments in the Appellees' brief proceed upon facts not involved in the instant case. There is no suggestion here that Appellants are "judges who intentionally or wantonly violate constitutional rights." (Appellees' Brief, p. 7.) Nor is the Virginia Court claiming an immunity which would deny an aggrieved party redress for deprivation of a constitutional right.

A.
The Virginia Court Took No Action
Contrary To Any Right Of The Plaintiffs.

The only transgression alleged against the Virginia Court is that it promulgated a Rule--expressly within its authority--limiting advertising by Virginia lawyers. The Virginia Supreme Court does not serve as the prosecutorial agency for the enforcement of its rules. Nor is there any evidence, apart from the existence of the Rule itself, that either Appellees or any lawyer of the Commonwealth had been subjected to, or threatened by, Appellants with prosecution for the violation of the Rule. The proposed sanction, the award of attorneys' fees, is asserted purely as punishment for the promulgation of a Rule that clearly appeared to be valid when it was promulgated. When this Court changed the prevailing law in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), all the defendants in this case timely acquiesced in the nonenforcement of the Rule--although such acquiescence was hardly necessary to prevent enforcement of the Rule after that decision.

There was no judicial action by the Justices of the Supreme Court of Virginia that could be described as "intentionally or wantonly violat[ing] constitutional rights." Indeed, the only recalcitrance suggested by the court below was the failure of the Virginia Court to change the rule as quickly as the District Court felt desirable. But this ground for supporting the imposition of the monetary penalty is specifically eschewed by the Appellees. Appellees' Brief, pp. 39-43.

B.
Plaintiffs Were Denied No Redress
For A Constitutional Wrong

There is no basis for Appellees' argument that prospective equitable relief is necessary in order to afford any avenue of redress. The fact is that this case involves no issue of prospective actions at all; the fee award was made because of past actions. Consumers Union was able to obtain the relief it sought. It could have obtained the same relief by proceeding in a different fashion.

The fact is that the Virginia Court was not a real party in interest. Judge Friendly's decision in Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 124 (S.D. N.Y. 1969) noted that the New York Court of Appeals was no more a necessary party than a legislature which adopts a statute. The judges who were parties to the suit were lower court judges who were applying a facially valid rule in an unconstitutional fashion.

Of course, one of the purposes of judicial immunity is to free the judiciary from collateral attacks resulting from changes in the case law. Litigants are generally limited to the relief available through an appeal rather than by suit against the Court. In bar disciplinary cases, for example, the federal remedy of an aggrieved party is through an appeal to this Court from the state's highest Court. See Schware v. Board of Bar Examiners, 353 U.S. 222, 248 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957). Theard v. United States, 354 U.S. 278 (1957). Hence, there is no apparent policy reason for persons challenging state bar rules to derive their remedy by federal suits against the high court of a state rather than by petitions to that court with

an appropriate appeal to this Court on questions of federal right.

Nor does the award of attorneys' fees fulfill any constitutional right of a successful litigant. Awards of attorneys' fees are authorized for the purpose of encouraging litigation. The enactment of 42 U.S.C. § 1988 was in response to the ruling of this court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1970). Its purpose was to alter the traditional American rule of practice by providing a statutory basis for attorneys' fees. The act intended the creation of no new substantive rights. S.Rep. No. 94-1011, 94th Cong., 2d Sess. 7 (1976).

Appellees denigrate the importance of judicial independence from collateral attack. Appellees' Brief, pp. 15-16. They speak against hundreds of years of history that distinguish between the propriety of correcting judicial error by appeal and the impropriety of "correcting" judicial error by collateral litigation that would make judges responsible to others than the courts charged with reviewing them.

Furthermore, an award of attorneys' fees has an equal or greater inhibiting effect than an award of damages. Even the bare possibility of intimidation of the judiciary warrants full immunity against an attorneys' fees award. See Imbler v. Pachtman, 424 U.S. 409, 422-523 (1976); Pierson v. Ray, 386 U.S. 547, 554 (1967).

II.

THE EXERCISE OF A COURT'S INHERENT RULEMAKING POWER IS NOT AN ADMINISTRATIVE ACT SUBJECT TO EQUITABLE RELIEF.

The exercise of the Virginia Court's rulemaking authority was an exercise of its inherent power over its Bar. "This power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein." Ex parte Bradley, 74 U.S. (7 Wall.) 364, 374 (1869). See Brown v. Supreme Court of Virginia, 359 F.Supp. 549, 554 (E.D. Va. 1973), aff'd 414 U.S. 1034 (1973); Ex parte Fisher, 33 Va. (6 Leigh) 619 (1835); Button v. Day, 204 Va. 547, 553, 132 S.E.2d 292, 297-298 (1963).

While there may be a basis upon which to dispute whether the Supreme Court's enactment of rules governing its Bar is deemed a "judicial" or "legislative" act, the promulgation of a rule clearly falls within the power which the Court inherently possesses. It involves the discretionary power of the Court to frame a rule of law. Thus, it is not merely an administrative[1] or ministerial act. See Brown v. Supreme Court of Virginia, supra, 359 F.Supp. at 554. Though the opinion of the majority below seems to rest on the assumption that the rulemaking power was judicial

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[1]The Supreme Court of Virginia did not act in the same capacity as did the judges in the cases relied upon by Appellees in their argument that a court's administrative duties take it outside the scope of judicial immunity. Appellee's Brief at 25-26. Unlike the actions of those courts, the power of the Virginia Court is inherent to it and part of its judicial powers. It is not merely a legislative delegation of duties generally foreign to the function of a court.

in nature[2] and addressed itself to judicial immunity on that ground, the dissent treated the rulemaking function as legislative, and would have applied legislative immunity. For purposes of this case, it does not matter which--legislative or judicial immunity--is invoked, the result should be the same.

Those cases relied upon by Appellees for the proposition that judicial immunity does not protect judges in the performance of their duties from equitable relief --a proposition this Court has never endorsed--simply reiterates the argument that judicial immunity applies only to actions for damages. But the relevant decisions of this Court may be read to bar equitable as well as legal actions against judges acting in a judicial capacity--especially when such actions result in monetary sanctions. See Stump v. Sparkman, 435 U.S. 345, 355 (1978); Pierson v. Ray, supra at 555, n. 9 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871).[3] Mitchum v. Foster, 407 U.S. 225 (1972) is not contrary because it involved no action against a judge; the decision recognized that the principles of equity, comity and federalism which restrain a federal court when asked to enjoin a state court proceeding were inapplicable on the facts of the case.

Appellees err in arguing that legislative immunity is not available to those performing a legislative function. It is not limited only to legislators. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). Butz v. Economou, 438 U.S. 478 (1978) justifies looking to the function, not the title, in determining the immunity to be afforded a government official.

Appellees erroneously construes the effect of Lake Country Estates. First, since the power exercised by the Supreme Court of Virginia is an inherent power which can be exercised independent of any act of the Virginia General Assembly, there is no basis for the contention that all administrative rulemaking bodies could claim legislative immunity. Second, though the Ninth Circuit did allow prospective declaratory and injunctive relief in Lake Country Estates, this relief was against those officials in their executive capacities, not their legislative capacities. Jacobsen v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1360, 1366 (9th Cir. 1977). Therefore, this Court's affirmance of the Ninth Circuit decision, does not prohibit the grant of full legislative immunity from all suits to the Supreme Court of Virginia.

III.

THE IMMUNITY OF THE VIRGINIA COURT IS CONSTITUTIONALLY BASED.

Where an immunity is essential to the performance of a branch of government, it has been

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[2] Lathrop v. Donohue, 367 U.S. 820 (1961), cited by Appellees for the proposition that promulgating bar rules is not a judicial act, involved a question of appellate jurisdiction, wherein it was noted that the rules had sufficient legislative character to be considered as "statutes." The court which had promulgated the rule was not a party to the suit.

[3] Brief on Behalf of the Appellants, at 7-13.

held to be incorporated in the Constitution. For instance, "[n]owhere in the Constitution...is there a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a president's powers, it is constitutionally based." United States v. Nixon, 418 U.S. 683, 711 (1974).

The Supreme Court of Virginia has recognized its power to regulate the bar is an essential incident of its constitutional investment of the judicial power of the Commonwealth. Button v. Day, supra. See Tenny v. Brandhove, 341 U.S. 367, 375 (1951). Such an important constitutional power and the immunity necessary to insure its free exercise are, thus, essential to a republican form of government and therefore guaranteed by Article IV, § 4 of the Constitution. Cf. Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966). Similarly, whether legislative immunity derives from the Speech and Debate Clause or from the common law (as contended by Consumers Union) is immaterial. The controlling fact is that it is fundamental to our scheme of government. The power to set compensation of state employees is an essential function of government immune from encroachment by Congress. National League of Cities v. Usery, 426 U.S. 833 (1976). The independence of the judiciary from awards of attorneys' fees must be even more fundamentally an essential aspect of state sovereignty.

IV.

THE SPECIAL CIRCUMSTANCES DEFENSE PRECLUDES AN AWARD OF FEES AGAINST THE COMMONWEALTH.

Consumers Union argues, for the first time on

appeal, that fees may be awarded against the Commonwealth under Hutto v. Finney, 437 U.S. 678 (1978). However, this is not a case where, as in Hutto, state officials were liable for fees, so that an award against the state treasury also was appropriate. Here, the defendants were not subject to a fee award in the first place, so no basis exists for awarding fees against the treasury. The "special circumstances" defense would never be available if fees were to be automatically awarded against the treasury without first finding a defendant liable for fees.

Until the decision of the District Court, the Virginia Bar was in the process of concluding a case which was left without meaningful issues by the decision of this Court in Bates. The Attorney General of Virginia had held the rule unenforceable insofar as it conflicted with Bates, and the Bar was formulating new advertising rules. None of the defendants had any intention of enforcing any rule contrary to Bates. The only act by the Virginia Court adverse to Consumers Union had been the adoption--prior to Bates--of an advertising ban which had been customary since 1908. 470 F.Supp. at 1074.

Thus, the reason the special circumstances doctrine is applicable to require denial of an award of attorneys' fees against the Virginia Court is not merely that it acted in good faith, but also it acted in accord with the law when it adopted a rule for protection of the public, never taking any other action adverse to the plaintiffs. If the District Court had applied proper factors in examining whether special circumstances existed, there would have been no basis for an award of attorneys' fees against the Virginia Court.

V.

THE VIRGINIA COURT HAS NOT WAIVED ITS DEFENSES.

Appellees continue to argue that the judicial immunity defense to the fee award is improperly raised on appeal (Appellees' Brief at 40.) As the District Court Opinion makes clear, the Virginia Court, in timely fashion prior to the District Court's decision, raised the issue of judicial immunity from an award of attorneys' fees under 42 U.S.C. § 1988. 470 F.Supp. at 1059. Moreover, the issue of the court's immunity from declaratory or injunctive relief under 42 U.S.C. § 1983 was presented to the District Court on petition for rehearing. Because the Virginia Court had no notice the District Court would attach relevance to the delay in amending the rule, or would assume the delay was due to bad faith, the petition for rehearing was the earliest reasonable opportunity to raise the issue of immunity from judgment. Certainly, the issue was presented in a manner which permitted a proper ruling thereon. A party need not plead immunity as long as the issue is presented to the trial court in circumstances which enable the court to rule on it without prejudice to the other party. Eslinger v. Thomas, 476 F.2d 225, 228 (4th Cir. 1976).

Immunity defenses are jurisdictional and can be raised on appeal for the first time or can be raised by this Court sua sponte. See Edelman v. Jordan, 415 U.S. 651, 678 (1974); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

Moreover, the Bar and the Court had no real reason to proceed differently. The State defendants proposed an order (1) declaring the

directory valid for publication, and (2) enjoining enforcement of the rules and regulations "insofar as such regulations prohibit lawyers practicing in the Commonwealth of Virginia from providing such information to plaintiff for publication." (App. 35.) This proposed a limited ruling, found no violation of 42 U.S.C. § 1983, called for a limited injunction not significantly different from that sought in the complaint, and provided for no award of attorneys' fees. The District Court was exercising jurisdition pursuant to 28 U.S.C. § 1343(3), under which a prevailing party is not entitled to an award of attorneys' fees.

If the District Court had entered the Order requested, the State defendants would have been satisfied to let this protracted litigation terminate. But that did not occur. Rather the District Court struck down the entire rule. Much of the rule was valid facially, such as the ban on false advertising. The District Court found that the defendants, including by implication the Virginia Court, had violated 42 U.S.C. § 1983, although no act of the court was cited as the basis for that finding. Relying on facts assumed, but not in evidence, the District Court awarded attorneys' fees because of the Virginia Court's failure to amend the rule. On petition for rehearing the Virgina Court offered to provide evidence demonstrating the inaccuracy of the assumed facts.

CONCLUSION

At issue in this case is whether the Supreme Court of any of the several states can properly exercise inherent judicial authority. It involves no question of federal supremacy; it presents no conflict between the usual functions of a branch of

government and individual rights under the Constitution. But this case will determine whether the independence of the judiciary will be jeopardized or will be preserved.

Chief Justice John Marshall best articulated the question at issue here during the Virginia Convention of 1829-30, when he said, "The greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent judiciary." A judiciary subject to assessment of attorneys fees in today's practice would soon be a dependent judiciary.

There is no blinking the conclusion that without reversal by this court no judge can be free of harassment in exercising any judicial function. The threat of such economic sanctions would skew countless decisions, conclusions, findings and functioning of our courts. It would unhappily alter the exercise of judicial power by both the states and the federal government to the great prejudice of the citizenry.

The doctrine of judicial immunity should not be encroached upon. It is a necessity in a well ordered system of jurisprudence; needful in order to avoid constant intimidation.

The judgment below should be reversed.

Respectfully submitted,

THE SUPREME COURT OF VIRGINIA
and

THE HONORABLE LAWRENCE W. I'ANSON,
Appellants.

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CERTIFICATE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, and counsel for The Supreme Court of Virginia and the Chief Justice, hereby certify that three copies of the foregoing have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this 13th day of February, 1980, as follows:

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FILED
JAN 8 1980
JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA,
and
LAWRENCE W. I'ANSON,
in his personal and official capacity as
Chief Justice of The Supreme Court of Virginia,

Appellants,

—v.—

CONSUMERS UNION OF THE
UNITED STATES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, *AMICI CURIAE*

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
and
LAWRENCE W. I'ANSON,
in his personal and official capacity as Chief Justice of the Supreme Court of Virginia,

Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, AMICI CURIAE

Interest of Amici*

For 60 years, the American Civil Liberties Union and its state affiliates,

* The parties have agreed to the filing of this brief. Letters of consent will be filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

including amicus ACLU of Virginia, have been dedicated to the protection of the Constitutional and statutory rights of the American people.

The present case is of particular interest to the ACLU and the ACLU of Virginia because the decision of the three-judge District Court is essential to the vitality of one such statutory right -- the right to receive fee awards in civil rights cases. Although the significance of this decision to public interest organizations such as ours, whose cases often involve actions brought pursuant to the civil rights acts, is clear, the decision, if reversed, would undermine Congress' intent to provide all private citizens with the means necessary to vindicate the important public policies underlying these civil rights laws. In recognition of the impact decisions involving attorney fee awards may have upon potential plaintiffs' willingness and ability to litigate civil rights cases, the ACLU and the New York Civil Liberties Union participated, amici curiae, in Hutto v. Finney, 438 U.S. 678 (1978), urging the validity of an award of fees against a state agency.

Amici similarly seek to participate here to urge this Court to resolve the issues presented in light of Congress' broad remedial purpose to provide persons whose rights have been violated and who cannot afford legal counsel with "effective access to the judicial process where their grievances can be resolved according to law." H.R. No. 94-1558 Cong., 2d Sess., p.1.

STATEMENT OF THE CASE

Amici herein adopt the statement of the case presented in the brief of appellee, Consumers Union of America, Inc.

SUMMARY OF ARGUMENT

Amici contend that the award of attorneys' fees and costs granted to appellees incident to a grant of prospective relief is not subject to doctrines of immunity and was therefore proper.

Doctrines of governmental immunity have traditionally sought to protect either certain governmental actions from all judicial review or to protect certain defendants from retrospective judicial

remedies. Point I. Thus, some attempts to secure retrospective compensatory relief for damages caused by allegedly unlawful governmental action have been barred by doctrines of immunity. However, there is no issue of retrospective relief in this case. Accordingly, in the circumstances of this case, no question of immunity is raised. Moreover, awards made directly against governmental entities, as here, avoid the dangers which the doctrines of immunity have sought to prevent, i.e., the possible unfairness of holding an official personally liable and the potential "chill" a holding may have on that official and others in the future performance of their duties. Point II.

Amici further contend that the Virginia legislature's delegation to the Virginia Supreme Court of the responsibility for supervising the professional and ethical standards of practicing attorneys did not entitle that court to a claim of legislative immunity. And because the Virginia Supreme Court was acting in an administrative capacity as agent of the state (and thus, was not bound by such judicial norms

as stare decisis, adversarial proceedings, or appeals), appellants are not entitled to judicial immunity. Point III.

Finally, amici argue that 42 U.S.C. §1988 was intended by Congress to supersede common law immunities, and to authorize federal judges to allocate the expenses of a successful application for prospective constitutional relief.

I. THE DISTRICT COURT'S DECISION TO REIMBURSE A SUCCESSFUL PLAINTIFF FOR FEES AND EXPENSES NECESSARILY INCURRED IN ESTABLISHING THE PROSPECTIVE UNCONSTITUTIONALITY OF A GOVERNMENT REGULATION IS NOT SUBJECT TO DOCTRINES OF IMMUNITY.

Historically, immunity doctrines[1/] have played two roles in our legal system. First, broad "jurisdictional" immunity has served to remove the merits of certain governmental actions from all judicial scrutiny; second, narrower "remedial" immunity has acted to shield certain defendants from retrospective judicial remedies while reserving to the courts prospective power to review the merits of the acts in question.[2/]

1/ This Court has recognized five categories of immunity: Sovereign immunity and Eleventh Amendment immunity insulate entities, while executive, legislative, and judicial immunities protect individual defendants.

2/ The bright-line distinction between prospective and retrospective relief drawn by this Court in the context of Eleventh Amendment immunity is a classic example of remedial immunity. Compare Ex Parte Young, 209 U.S. 123 (1908) and Quern v. Jordan, 440 U.S. 332 (1979). Similar distinctions between prospective and retrospective relief exist in the areas of prosecutorial and judicial immunity. Compare Doran v.

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Given Chief Justice Marshall's rationale in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the drastic concept of jurisdictional immunity has played a very limited role in our constitutional jurisprudence.[3/] Under

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Salem Inn, Inc., 422 U.S. 922 (1975) (recognizing prosecution immunity) with Imbler v. Pachtman, 424 U.S. 409 (1976) (recognizing immunity from damage claim) and Gerstein v. Pugh, 420 U.S. 103 (1975) and Mitchum v. Foster, 407 U.S. 225 (1972) (granting injunctive relief) with Stump v. Sparkman, 435 U.S. 349 (1978) (recognizing immunity from damage claim).

3/ The leading and, perhaps, sole modern example of jurisdictional immunity is the absolute exemption from judicial review accorded certain preparatory acts taken by legislators in furtherance of core legislative duties: United States v. Helstoski, 61 L.Ed.2d 12 (1979) (speeches on floor of Congress cannot be subject of any judicial scrutiny). See also, Tenney v. Brandhove, 341 U.S. 367 (1959). Of course, even under legislative immunity, the finished legislative product becomes subject to judicial review. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). This Court has recently noted that even when legislative immunity insulates individual legislators from judicial review, relief may be sought directly against the appropriate governmental entity so long as no entity immunity exists. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 59 L.Ed.2d 401 (1979).

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a series of rubrics, each of the doctrines of immunity nevertheless permits prospective judicial review of the constitutionality of challenged governmental action.[4/] Since the

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Moreover, even the preparatory stages of legislation become subject to a measure of judicial review if the legislature seeks to enforce its demands by contempt citations. E.g., Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); United States v. Reynolds, 345 U.S. 1 (1953). Cf. Groppi v. Leslie, 404 U.S. 496 (1972); or seeks to bar qualified legislators from participating in the legislative process. Powell v. McCormack, 395 U.S. 486 (1969); Bond v. Floyd, 385 U.S. 116 (1966). Finally, this Court's cautious approach to the scope of a legislator's core legislative function has further circumscribed the application of legislative immunity. Hutchinson v. Proxmire, 61 L.Ed.2d 411 (1979); Doe v. McMillan, 412 U.S. 306 (1973).

4/ The characteristic judicial approach to unconstitutional questions in the context of immunity doctrines has been the invocaction of a process which reasons that action in excess of constitutional limits is ultra vires and, thus, not entitled to immunity. The question of immunity is, thus, made coterminous with the merits of the constitutional issue. Celebrated examples of this Court's recognition that action in excess of constitutional merits is outside the scope of immunity include Ex Parte Young, 209 U.S. 123

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ban on lawyer advertising administered by the Supreme Court of Virginia was alleged (correctly) to violate the First Amendment, no serious question exists concerning the power and duty of a Marbury court to have considered the merits and to have issued a narrow prohibitory injunction against the continued enforcement of an unconstitutional regulation. E.g., Ex Parte Young, 209 U.S. 123 (1908).[5/]

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(1908); United States v. Lee, 106 U.S. 171 (1882); Butz v. Economou, 438 U.S. 478 (1978); and Ex Parte Virginia, 100 U.S. 339 (1880). In the absence of a constitutional claim, broad jurisdictional immunity appears to continue to bar all judicial review of sizeable areas of sub-constitutional governmental action. E.g., Kendall v. Stokes, 3 How. 87 (1845); Wilkes v. Dinsman, 7 How. 89 (1849); Barr v. Matteo, 360 U.S. 564 (1959); Dalehite v. United States, 346 U.S. 15 (1953). Whether an inherent justification exists for such a broad exemption from judicial review is an open question.

5/ This Court has repeatedly entertained cases seeking prospective relief against allegedly unconstitutional prosecutorial or judicial action. E.g., Gerstein v. Pugh, 420 U.S. 103 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). See also Ex-Parte Virginia, 100 U.S. 339 (1879); Mitchum

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Although "jurisdictional" immunity has played little or no role in constitutional litigation, its less dramatic counterpart, "remedial" immunity, has been invoked to shield individual governmental officials

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v. Foster, 407 U.S. 225 (1972). For examples of prohibitory injunctions against unconstitutional judicial action issued by the lower federal courts, see, e.g., Long v. Powell, 388 F. Supp. 422 (D. Ga. 1975); Quadra v. Superior Court, 375 F. Supp. 605 (N.D. Cal. 1974); Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969); Phillips v. Cole, 298 F. Supp. 1049 (N.D. Miss. 1968); Bramlett v. Peterson, 307 F. Supp. 1311, 1321-22 (M.D. Fla. 1969); Koen v. Long, 302 F. Supp. 1383 (E.D. Mo. 1969); Alsager v. Polk County Juvenile Court, 406 F. Supp. (D. Iowa 1975). The authorities are canvassed in Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972) rev'd on other grounds, sub nom., O'Shea v. Littleton, 414 U.S. 488 (1974). Unlike the broad mandatory injunction vacated in O'Shea, the court below issued a narrow prohibitory order. Finally, injunctions aimed at unconstitutional judicial conduct will often raise federalism concerns expressed in Younger v. Harris, 401 U.S. 37 (1971) and its progeny, as well as issues of the propriety of equitable relief given the usual availability of adequate remedies at law. However, neither a Younger issue nor an issue as to the propriety of equitable relief is present in this case.

from the retroactive consequences of judicial review whenever necessary to encourage the vigorous exercise of sensitive governmental functions. E.g., Stump v. Sparkman, 435 U.S. 359 (1978); Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 13 Wall. 335 (1872) (absolute judicial immunity from compensatory damages); Edelman v. Jordan, 415 U.S. 651 (1974); Quern v. Jordan, 440 U.S. 332 (1979) (absolute Eleventh Amendment immunity from compensatory damages); Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute prosecutorial immunity from compensatory damages); Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975); Butz v. Economou, 438 U.S. 478 (1978) (qualified executive immunity from compensatory damages).[6/] Remedial immunity cases invariably involve attempts to secure

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6/ The concept of a qualified immunity based on good faith and reasonable action shades imperceptibly into that of the good faith defense. Apart from possible pleading on burden of proof issues, no difference appears to exist between the qualified immunity described in Scheuer and Butz, supra, and the good faith defense described in Pierson v. Ray and Wood v. Strickland, supra. Thus, as Mr. Justice Rehnquist suggested in dissent in Butz, it is probably more correct to describe executive immunity as having been abolished in favor of a flexible good faith defense.

retrospective compensatory relief for damages caused by an allegedly unlawful governmental act. Where, as in this case, no issue of a retrospective damage award is present, no basis exists for the invocation of remedial immunity. Since the award of attorneys' fees and costs at issue herein is merely a Congressionally authorized allocation of the expenses of reaching a prospective decision on the regulation's constitutionality, it does not trigger the application of remedial immunity.

Congress, in enacting 42 U.S.C. §1988, has determined that disputes involving constitutional rights are so important (and so unlikely to be adequately financed) that the necessary economic costs of providing legal and factual data to a judge may be allocated to an unsuccessful government defendant. Such an allocation of the necessary expenses of resolving disputes concerning the prospective constitutionality of governmental action is a far cry from the imposition of retrospective compensatory damages. See generally, Hutto v. Finney, 437 U.S. 678 (1978). Unlike the imposition of compensatory damages, no blame placing is involved in an award of attorneys' fees pursuant to 42 U.S.C.

§1988. Rather, such an award merely reflects a considered Congressional judgment as to the proper allocation of the inevitable expenses of determining the prospective constitutionality of a challenged governmental act.7/

This Court has repeatedly noted that the decision to allocate the economic costs of an action, including attorneys' fees, does not raise issues of remedial immunity. E.g., Hutto v. Finney, 437 U.S. 678 (1978); Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927). See also, Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972), aff'd mem., 409 U.S. 942 (1972); Hadnott v. Amos, 394 U.S. 358 (1969).

7/ Unlike an award of compensatory relief, which is a classic loss-shifting remedy, an award of attorneys' fees under 42 U.S.C. §1988 is a cost-spreading device which allocates the cost of producing a benefit to the benefitted group. Thus, a litigant who obtains prospective relief against unconstitutional activity confers a significant benefit upon the community, justifying a decision to allocate the cost of producing the benefit to a government defendant capable of spreading it across the benefitted group. See, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Hall v. Cole, 412 U.S. 1 (1913). Cost spreading, unlike loss-shifting, does not trigger remedial immunity.

In Hutto, this Court ruled that Congress, in enacting 42 U.S.C. §1988, had authorized an award of attorneys' fees against the Arkansas Department of Corrections, notwithstanding Arkansas' claim of Eleventh Amendment immunity. In response to Arkansas' claim that its Eleventh Amendment immunity could not be overridden in the absence of explicit congressional language,[8/] Mr. Justice Stevens, writing for the Court, noted the distinction between retroactive liability for pre-litigation conduct (requiring explicit language) and the attempt to allocate expenses necessarily incurred in litigation seeking prospective relief (which does not require explicit language). Mr. Justice Stevens noted:

> Unlike ordinary 'retroactive' relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.

8/ This Court held in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), that Congress, pursuant to Section 5 of the Fourteenth Amendment, was empowered to supersede Eleventh Amendment immunity by legislation. The legislation in Fitzpatrick explicitly established state liability. No such explicit language exists in 42 U.S.C. §1988.

> (An award of costs will almost invariably be incidental to an award of prospective relief, for costs [and attorneys' fees under 42 U.S.C. §1988] are generally awarded only to prevailing parties, see Fed Rule Civ Proc 54(d), and only prospective relief can be successfully pursued by an individual in a suit against a State [or a judge])." 437 U.S. at 695 n.24.

Just as attorneys' fees may be assessed against a state incident to the grant of prospective relief without violating principles of remedial immunity established by Edelman v. Jordan, 415 U.S. 651 (1974), so may attorneys' fees be assessed against a court incident to the grant of prospective relief without violating principles of remedial immunity established by Stump v. Sparkman, 435 U.S. 349 (1979), especially where, as here, the fees are to be paid by the State of Virginia.[9/] Similarly, in

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9/ The District Court carefully tailored its award to run only against the Supreme Court of Virginia and the Chief Justice in his official capacity. Thus, as in Hutto, ultimate payment will be made by the state. Given the fact that no individual liability is contemplated, personal immunities, judicial or legislative, are not implicated at all. Rather, this case would appear to be governed solely by the entity immunity rules set forth in Hutto v. Finney, supra.

Fairmont Creamery, this Court assessed costs (including a statutory award of attorneys' fees) against Minnesota, despite a claim of sovereign immunity.

Finally, in both Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972), aff'd mem. 409 U.S. 942 (1972) and in Hadnott v. Amos, 394 U.S. 358 (1969), this Court approved fee awards to counsel engaged in prospective constitutional litigation despite the existence of legislative and judicial defendants with claims to traditional remedial immunity.[10/]

Properly viewed, therefore, no conflict exists between remedial immunity, which grants protection against retroactive damage awards, and fee awards incident to a grant of prospective relief against unconstitutional activity. Just as remedial immunity is designed to encourage vigorous public action, an award of fees to successful constitutional

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(fn continued from preceding page)

The inapplicability of personal immunity doctrines to awards payable by governmental entities is discussed infra at Point II.

10/ In a related context, this Court has recognized that, so long as the judicial remedy involved is prospective, the existence of economic consequences incident to the grant of prospective relief does not violate principles of remedial immunity. E.g., Quern v. Jordan, 440 U.S. 332 (1979); Milliken v. Bradley, 433 U.S. 267, 293 (1977) (Powell, J.).

litigants is designed to encourage a vigorous private counterpoise to public action. It is the coexistence of retroactive immunity and prospective fee awards which maintains the healthy tension between robust individualism and energetic government that characterizes a functioning democratic state.

II. NEITHER JUDICIAL NOR LEGISLATIVE IMMUNITY BARS AWARDS PROPERLY RENDERED AGAINST A GOVERNMENTAL ENTITY

The curious history of personal immunities enjoyed by certain favored categories of official defendants has passed through several steps.

Confronted initially with the existence of sovereign immunity as a bar to judicial review of allegedly unlawful government action,[11/] British courts evolved a mechanism for asserting a measure of control over agents of the Crown. Reasoning that an official of the Crown who acted in excess of his legal authority was not, in fact, clothed with the authority of the sovereign, British courts treated such an official as a private tortfeasor, ineligible for sovereign immunity.

11/ For the historical origins of sovereign immunity and the evolution of judicial techniques for dealing with it, see Ehrlich, Proceedings Against the Crown (1216-1377) in 6 Oxford Studies in Social and Legal History (Vinogradoff ed. 1921). Professor Jaffe suggests that judicial response to sovereign immunity can be divided into two categories: (1) an expansive development of the writ of right and (2) the evolution of the notion that an official acting beyond the scope of his lawful authority is ultra vives and, hence, not an agent of the sovereign. Jaffe, Suits Against Government and Officers: Sovereign Immunity, 77 Harv.L.Rev. 1 (1963).

Thus, in both Ashby v. White, 6 Mod. 45, 87 Eng. Rep. 808 (Q.B. 1702), rev'd, 1 Brown P.C. 45, 1 Eng.Rep. 417 (H.L. 1703) and Entick v. Carrington, 2 Wils 275, 95 Eng. Rep. 807 (K.B. 1976), agents of the Crown were deemed to have forfeited sovereign immunity by acting outside the scope of their lawful authority. Since it was often difficult, if not impossible, for an agent of the Crown to know the precise scope of his lawful authority, official defendants were placed in the unenviable position of risking substantial economic liability in carrying out instructions subsequently found to have been unlawful.

In America, where an official's authorization (and his immunity) was dependent upon both the legality of his orders and the constitutional power to issue them, an official defendant's plight became doubly difficult. Thus, an official, acting pursuant to direct orders, forfeited his sovereign immunity if a court subsequently found that the orders were beyond the constitutional power of the issuer. Such an official, stripped of sovereign immunity, was personally liable to an injured plaintiff. E.g., Little v. Barreme, 2 Cranch 170 (1804). Moreover, although sporadic indemnification of officials who had acted pursuant to

invalid orders took place, no generally accepted notion of a "good faith defense" existed to shield such officials from potentially devastating liability.[12/] In order to shield officials performing sensitive public functions from the danger of post hoc strict liability for having committed an "unauthorized" official act, courts evolved the notion of personal immunity. Such a personal immunity came to exempt judges, legislators, and ranking executives from the legal fiction established by Ashby v. White and Entick v. Carrington to circumvent sovereign immunity.[13/] However, the creation of personal immunities as a counterbalance to the legal fiction created by Ashby v. White and Entick v. Carrington posed an unacceptable choice between no recovery for an injured plaintiff or strict

12/ It was not until Butz v. Economou, 438 U.S. 478 (1978), that the principle of a good faith defense for federal officials charged with having committed unconstitutional acts was explicitly recognized by this Court. 438 U.S. at 507 n.34.

13/ For the evolution of judicial immunity, see Floyd v. Barker, 12 Co.Rep. 23, 77 Eng. Rep. 1305 (Star Chamber 1607); Case of the Marshalsea, 10 C.Rep. 68b, 77 Eng.Rep. 1027 (C.P. 1613); Terry v. Huntington, 145 Eng. Rep. 557 (Ex. 1669); Yates v. Lansing, 5 Johns R. 282, 290 (N.Y. 1810) (Kent, C.J.); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

liability for an innocent official. Such a dichotomy was inherently unstable and, predictably, modern law has evolved at both of the extremes.

First, modern cases have recognized that a government official who acts with a good faith, reasonable belief that his acts are "lawful" ("authorized," in the language of the early cases) should not be personally liable for compensatory damages. E.g. Pierson v. Ray, 386 U.S. 547 (1967); Wood v. Strickland, 420 U.S. 308 (1975). Second, modern courts have tended to expand the ability of a plaintiff to secure relief directly against the government without the necessity of fashioning a fictitious immunity circle designed to separate officials from the sovereign. E.g., United States v. Lee, 106 U.S. 196 (1882); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). See also, Monell v. New York State Department of Social Services, 436 U.S. 658 (1978). But see Quern v. Jordan, 440 U.S. 332 (1979). For developments in the state courts, see, e.g., Brown v. Commonwealth, 453 Pa. 566, 305 A.2d 868 (1973); Ayala v. Philadelphia Board of Public Education, 453 Pa. 584, 305 A.2d 877 (1973). A.L.I. Restatement (2d) of the Law of Torts, §895B at 23, 24 (Comment A) (Tent. Draft

Nov. 19, 1973). See Muskopf v. Corning Hospital Dist., 55 Cal.2d 24, 359 P2d 457 (1961).

Thus, this Court has already recognized in Scheuer v. Rhodes, 416 U.S. 232 (1974), and Butz v. Economou, 438 U.S. 478 (1978), that the emergence of a fully developed good faith defense has rendered the absolute personal immunity of ranking executive officials unnecessary and, hence, obsolete. In Stump v. Sparkman, 435 U.S. 359 (1978), however, this Court declined a simliar invitation to supplant absolute judicial immunity with a good faith defense. And amici recognize that were the award herein to impose retrospective liability individually upon members of the judiciary, it would run afoul of judicial immunity.[14/] However, in fashioning its decree, the District Court took advantage of the second response to the dilemma posed by personal immunities as a counterpoise to an immunity circle--the increased availability of direct governmental

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14/ In Point I amici have argued that an award of costs and fees incident to a grant of prospective relief against unconstitutional judicial action does not trigger a remedial immunity. Under such an analysis, costs and fees could be assessed against individual judges, subject only to the discretion conferred by 42 U.S.C. §1988.

liability.[15/] The District Court avoided the twin dangers of personal unfairness and chilling effect which underlie the initial recognition of judicial immunity by tailoring an award payable not by individual judges but by the State of Virginia. In Hutto v. Finney, 437 U.S. 678 (1978), both Mr. Justice Stevens for the majority and Mr. Justice Rehnquist in dissent noted that an award of attorneys' fees payable by the State of Arkansas would not chill individual prison officials in the performance of their duties. 437 U.S. at 700 n.32. (Stevens, J.); 437 U.S. at 717 (Rehnquist, J., dissenting). Similarly, an award of fees payable by the State of Virginia would not chill the Justices of the Supreme Court of Virginia in the performance of their duties any more than the routine award of costs in Fairmont Creamery "chilled" Minnesota officials in

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15/ Ordinarily, an award against the State of Virginia would be barred by sovereign immunity embodied in the Eleventh Amendment. However, in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), this Court ruled that Congress was empowered to waive a state's Eleventh Amendment immunity. In Hutto v. Finney, 437 U.S. 678 (1978), this Court ruled that Congress, in enacting 42 U.S.C. §1988, had overridden the Eleventh Amendment immunity in the context of costs and fees. Eleventh Amendment immunity continues, however, in the context of retrospective awards on the merits. Quern v. Jordan, 440 U.S. 332 (1979).

that case. Once it becomes possible to pierce the veil of sovereign immunity, resort to fictitious immunity circles and personal immunities becomes unnecessary. In such cases, a direct award against the sovereign permits full compensation without the risks of personal unfairness and chilling effect which forced the courts to invent personal immunities in the first place.

If there had been no sovereign immunity, British courts would not have been obliged to invent the legal fiction of strict liability for ultra vires official action to avoid it. If such a legal fiction had not threatened unfairness and sluggish government, our courts would not have been obliged to invent personal immunity as a counterpoise to it. The manifest unfairness threatened by personal immunity has now obliged courts to consider supplanting it with a good faith defense or, even more significantly, doing away with the artificial ban on governmental liability which set us on this circular path in the first place. Thus, amici suggest that when, as here, legal theory has progressed to the point where a given award is payable by a governmental entity, no basis exists to frustrate the award by misplaced reliance on personal immunity which exists solely as a consequence

of an historic inability to recover against the sovereign.[16/]

16/ Similar but not identical issues are raised in deciding whether an entity may claim a derivative good faith defense. See generally, Owen v. City of Independence, No. 78-1779, cert. granted, 48 U.S.L.W. 3189 (Oct. 1, 1979); Sala v. County of Suffolk, No. 79- , petition for writ of certiorari pending. Whatever the resolution of the question of whether an entity-defendant is entitled to claim a derivative good faith defense, no basis exists for a claim of derivative personal immunity. In a derivative good faith defense context, the issue of whether the government should be liable without fault is presented. In a derivative personal immunity setting, a government official has acted culpably. The sole issue is whether, despite culpable action, the government may escape liability merely because the individual defendant is exempt from suit.

III. THE ADMINISTRATION OF AN UNCONSTITUTIONAL DISCIPLINARY REGULATION IS ENTITLED TO NEITHER JUDICIAL NOR LEGISLATIVE IMMUNITY.

The Virginia legislature has delegated to the Supreme Court of Virginia the responsibility for supervising the professional and ethical standards of attorneys practicing in that state. In vesting broad regulatory authority over the legal profession in the Virginia Supreme Court, the Virginia legislature followed a familiar pattern pursuant to which a legislature delegates to a qualified administrative body the responsibility for monitoring significant areas of our economic and political life. Thus, for example, teachers are regulated by boards of education; doctors by medical boards; engineers by technical groups; and the securities industry by the Securities and Exchange Commission.[17/] In choosing the Supreme Court of Virginia as its nominee to monitor lawyers, the Virginia legislature simply chose one from

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17/ Obviously, the list of regulatory agencies and regulated activities is virtually endless.

among a number of possible regulatory bodies, staffed potentially by judges, laymen, and/or lawyers. Surely, the "immunity" of such a regulatory body cannot turn on whether it is staffed by judges or by non-judges. The actions of the Supreme Court of Virginia in executing its administrative responsibilities are not rendered "judicial" merely because they are executed by robed officials. Rather, as this Court has carefully defined, judicial immunity is a functional rather than a personal privilege. Thus, in Butz v. Economou, 438 U.S. 478 (1978), this Court did not hesitate to vest executive officials performing adjudicatory functions with an absolute judicial immunity. Conversely, in Stump v. Sparkman, 435 U.S. 349 (1978), this Court noted that judges were entitled to claim judicial immunity solely for "judicial" acts.[18/] It is,

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18/ This Court has followed a similarly strict functional view of the scope of legislative immunity. E.g. Gravel v. United States, 408 U.S. 606 (1972); Doe v. McMillan, 412 U.S. 306 (1973); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Hutchinson v. Proxmire, 61 L.Ed.2d 411.

amici suggest, not a judicial act to administer a general regulatory scheme indistinguishable in principle from the vast body of administrative regulations routinely subjected to broad judicial review.

As Mr. Justice White noted in Stump v. Sparkman, this Court has never considered the necessary attributes of a "judicial" act for immunity purposes. However, in Butz, in determining that administrative law judges should be vested with absolute judicial immunity, the Court held:

> [T]he safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process and correctibility of error on appeal are just a few of the many checks on malicious action by judges. 438 U.S. at 512.

None of the factors enumerated in Butz as justifying judicial immunity is present in the Supreme Court of Virginia's administration of lawyer disciplinary regulations.

First, the issue of lawyer advertising is an issue of political significance, pitting, as it does, segments of the bar against each other. In administrative regulations governing lawyer advertising, the Virginia Supreme Court is subject to precisely the "political" (in the non-pejorative sense) influences which are brought to bear on any administrative body called upon to resolve disputes between interest groups in a given industry. Second, as a regulatory body, the Virginia Supreme Court is free to discard past rules and regulations as unwise without regard to the principles of stare decisis which govern its judicial deliberations. Indeed, it is the flexibility of a decision-maker not bound by precedent which characterizes the administrative process. Third, no pretense of an adversary process exists in the deliberations of the Virginia Supreme Court over the disciplinary regulations at issue herein, and no possibility of appeal exists within the Virginia judiciary. Accordingly, if one applies the Butz criteria to the administrative activities performed by the

Virginia court, those activities cannot qualify as a judicial act.[19/]

Nor can the Supreme Court of Virginia claim legislative immunity. This Court has carefully traced the evolution of legislative immunity as a device to shield legislators from judicial interference in the performance of core legislative functions. E.g. United States v. Helstoski, 61 L.Ed.2d 12 (1979).[20/] However, this Court

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19/ Although this Court has not explicitly passed upon the nature of a judicial act for immunity purposes, it has repeatedly distinguished between judicial acts and administrative acts performed by judges. E.g. Roudesush v. Hartke, 495 U.S. 15 (1972); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851). Lower courts have consistently declined to provide judicial immunity to non-judicial acts. E.g. Ktsames v. Underwood, 552 F.2d 740 (7th Cir. 1977); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970).

20/ Since legislative immunity is designed to permit legislators maximum freedom of action in carrying out their legislative responsibilities, this Court has applied it both retrospectively and prospectively. Compare, Tenney v. Brandhove, 341 U.S. 367 (1951) with Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

has never suggested that legislative immunity shields administrative officials engaged in the traditional rule-making process. If a Virginia regulatory body is entitled to legislative immunity in connection with the promulgation of rules and regulations governing lawyers, a similar immunity attaches to every administrative body in the land.[21/] Moreover, the District Court's decree in no way interfered with the rule-making process. Instead, the District Court sought to act merely upon the finished product by enjoining its prospective enforcement. Not even the most vigorous proponent of legislative immunity would argue that judicial review of the prospective constitutionality of a statute is precluded. E.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Since the Virginia Court acts

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21/ If legislative immunity applies to the administrative rule-making process, litigants would be powerless to seek judicial review of unconstitutional information demands and would be barred from challenging the procedural regularity of the rule-making process. Cf. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

as a prosecutor under its own rules, the District Court's decision did nothing more than enjoin a prosecutor from enforcing an unconstitutional disciplinary rule. E.g. Ex Parte Young, 209 U.S. 123 (1908). Where a body both promulgates a rule and enforces it, the body can hardly claim legislative immunity from an order to refrain from enforcing the rule as unconstitutional. Cf. Kilbourn v. Thompson, 103 U.S. 168 (1881).[22/]

22/ Petitioners' legislative immunity claim is rendered even more tenuous by the fact that the District Court's award runs not against the "legislators" but against the State of Virginia. In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 59 L.Ed.2d 401 (1979), this Court noted that even if legislative immunity were to bar an action against individuals, an action would nevertheless lie against the agency itself. Lake Country Estates does not support even a claim of personal legislative immunity since, in the narrow context of a regional body governed solely by interstate compact, the Tahoe Commissioners performed as legislators, not administrators. Given the continued functioning of the Virginia legislature, one can hardly argue that the Supreme Court of Virginia is the sole legislative authority for Virginia. Quite the contrary, its power over the legal profession is an administrative one conferred by the Virginia legislature. Unless the exercise by an administrative agency of delegated rule-making power is to be treated as a legislative act (Cf. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)), the Virginia Court's rule-making process is not entitled to legislative immunity.

IV. CONGRESS INTENDED TO SUPERSEDE COMMON LAW IMMUNITIES IN ENACTING 42 U.S.C. §1988.

This Court has already held that Congress, in enacting 42 U.S.C. §1988, intended to override the constitutionally-based immunity enjoyed by states under the Eleventh Amendment. Hutto v. Finney, 437 U.S. 678 (1978). Where, as here, an award of fees pursuant to 42 U.S.C. §1988 will be paid by the state, Hutto is dispositive of any possible immunity issue.[23/] Even if one assumes, however, that awards payable by a state entity are governed by personal, as well as entity-immunity rules, Congress clearly intended to supersede judicial immunity to a grant of attorneys' fees in an appropriate case. First, given Hutto's holdings that Congress intended to override a constitutionally-based immunity, it is an a fortiori proposition that lesser

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23/ See generally, Point II, supra.

common law immunities were superseded as well.[24/] Second, Congress clearly expressed its intent to sweep away immunity-based restrictions on awards of fees in constitutional cases, by specifically referring to Pierson v. Ray, supra.

Thus, although amici have argued that an award of fees incident to a grant of prospective relief is not subject to doctrines of immunity; that awards of fees payable by the state do not implicate judicial immunity; and that appellants

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24/ Petitioners suggest that Congress lacks power to supersede the judicial immunity of state judges. However, common law personal immunities are nothing more than judge-made rules of self-restraint. This Court has consistently recognized that a legislature may modify or abolish common law immunities. E.g. Pierson v. Ray, 386 U.S. 547 (1967) (Congress did not intend to abolish judicial immunity by enacting 42 U.S.C. §1983); Tenney v. Brandhove, 341 U.S. 367 (1951) (Congress did intend to abolish legislative immunity by enacting 42 U.S.C. §1983). Appellants' suggestion that common law immunities are codified by the Tenth Amendment, or even more tenuously, by the Guarantee Clause, is wholly without precedential support.

were not engaged in "judicial" or "legislative" acts within the meaning of immunity doctrines, even if the District Court's order would, in the absence of 42 U.S.C. §1988, have been barred by a common law immunity, the clear intent of Congress has freed federal judges from the constraints of immunity doctrines in allocating the expenses of a successful application for prospective constitutional relief.

CONCLUSION

For the above-stated reasons, the order of the District Court should be affirmed.

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